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A TREATISE

ON THE LAW OF

MARRIAGE, DIVORCE, SEPARATION

AND

DOMESTIC RELATIONS

By JAMES SCHOULER

Author of "Wills, Executors and Administrators"; "The Law of Personal Property"; Etc.

SIXTH EDITION

IN THREE VOLUMES

By ARTHUR W. BLAKEMORE

Of the Boston Bar; Author of "Blakemore and Bancroft on Inheritance Taxes"; The Article on Wills in "Cyc"; Etc.

VOLUME II

THE LAW OF MARRIAGE AND DIVORCE

EMBRACING

Marriage, Divorce and Separation, Alienation of Affections, Abandonment, Breach of Promise, Criminal Conversation, Curtesy and Dower.

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PART VII.

MARRIAGE.

CHAPTER I.

NATURE OF MARRIAGES.

SECTION 1072. Definition of Marriage.
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1074. Public Regulation of Marriage.
1075. Mutual Consent.
1076. Necessity of Consummation.
1077. Agreement between Parties that Marriage Not Binding.
1078. Invalid Agreement that No Cohabitation Should Follow Marriage.
1079. Eugenics Statute.
1080. Effect on Revocation of Will or Discharge of School Teachers.

§ 1072. Definition of Marriage.

The word "marriage" signifies, in the first instance, that act by which a man and woman unite for life, with the intent to discharge towards society and one another those duties which result from the relation of husband and wife. The act of union having been once accomplished, the word comes afterwards to denote the relation itself. Marriage is more than a contract and is the civil status of a man and woman united to perform the duties of the relation[1] in which the State is deeply interested.[2] Every marriage is a marriage for all purposes and whatever its form is attended

1. Taylor v. Taylor, 108 Md. 129, 69 A. 632; State v. Bittick, 103 Mo. 183, 15 S. W. 325, 11 L. R. A. 587, 23 Am. St. R. 869; Same v. Cooper, 103 Mo. 266, 15 S. W. 327; Banks v. Galbraith, 149 Mo. 529, 51 S. W. 105; Knost v. Knost, 229 Mo. 170, 129 S. W. 665; Coy v. Humphreys, 142 Mo. App. 92, 125 S. W. 877; Mitchell v. Mitchell, 117 N. Y. S. 671, 63 Misc. 580; Barker v. Barker, 151 N. Y. S. 811, 88 Misc. 300; Grigsby v. Reib, 153 S. W. 1124, affirming judgment (Civ. App.), 139 S. W. 1027.

2. People v. Case, 241 Ill. 279, 89 N. E. 638; Coe v. Hill, 201 Mass. 15,

with all the civil rights.[3] A common-law marriage is any mutual agreement between the parties to be husband and wife *in praesenti*.[4]

§ 1073. Marriage More Than a Civil Contract.

It has been frequently said in the courts of this country that marriage is nothing more than a civil contract[5] to which the State is a party[6] favored in the law.[7] That it is a contract is doubtless true to a certain extent, since the law always presumes two parties of competent understanding who enter into a mutual agreement, which becomes executed, as it were, by the act of marriage. But this agreement differs essentially from all others. This contract of the parties is simply to enter into a certain status or relation. The rights and obligations of that status are fixed by society in accordance with principles of natural law, and are beyond and above the parties themselves. They may make settlements and regulate the property rights of each other; but they cannot modify the terms upon which they are to live together, nor superadd to the relation a single condition. Being once bound they are bound forever. Mutual consent, as in all contracts, brings them together; but mutual consent cannot part them.[8]

86 N. E. 949; Levey v. Levey, 150 N. Y. S. 610, 88 Misc. 315, order affirmed, 153 N. Y. S. 1125.

3. Lavery v. Hutchinson, 249 Ill. 86, 94 N. E. 6; (1908) Reifschneider v. Reifschneider, 144 Ill. App. 119, judgment affirmed (1909), 241 Ill. 92, 89 N. E. 255, agreement to keep it secret and that it shall not take effect for certain period, does not affect its validity; Steves v. Smith, 49 Tex. Civ. App. 126, 107 S. W. 141.

4. *In re* Wells' Estate, 108 N. Y. S. 164, 123 App. Div. 79.

5. Nelson v. Brown, 164 Ala. 397, 51 So. 360; Caras v. Hendrix, 62 Fla. 446, 57 So. 345; De Vries v. De Vries, 195 Ill. App. 4; Develin v. Riggsbee, 4 Ind. 464; Rundle v. Pegram, 49 Misc. 751; Pope v. Missouri Pac. Ry. Co., 175 S. W. 955; Coad v. Coad, 87 Neb. 290, 127 N. W. 455; Fryer v. Fryer (S. C. 1832), Rich. Eq. Cas. 85.

6. Lauer v. Banning, 152 Ia. 99, 131 N. W. 783; Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. R. 302; Willits v. Willits, 76 Neb. 228, 107 N. W. 379, 5 L. R. A. 767.

7. Houston Oil Co. of Texas v. Griggs (Tex. Civ. App.), 181 S. W. 833.

8. Blank v. Nohl, 112 Mo. 159, 20 S. W. 477, 18 L. R. A. 350; Jordan v. Missouri & Kansas Telephone Co., 136 Mo. App. 192, 116 S. W. 432.

Death alone dissolves the tie — unless the legislature, in the exercise of a rightful authority, interposes by general or special ordinance to pronounce a solemn divorce; and this it should do only when the grossly immoral conduct of one contracting party brings unmerited shame upon the other, disgraces an innocent offspring, and inflicts a wound upon the community. So in other respects the law of marriage differs from that of ordinary contracts. For, as concerns the parties themselves, mental capacity is not the only test of fitness, but physical capacity likewise — a new element for consideration, no less important than the other. Again, the encumbrance of an existing union operates here as a special disqualification. Blood relationship is another. So, too, an infant's capacity is treated on peculiar principles, as far as the marriage contract is concerned, for he can marry young and be bound by his marriage. Third parties cannot attack a marriage because of its injury to their own interests. International law relaxes its usual requirements in favor of marriage. And finally the formal celebration now prevalent, both in England and America, is something peculiar to the marriage contract; and in its performance we see but the faintest analogy to the execution and delivery of a sealed instrument.

The earnestness with which so many of our American progenitors insisted upon the contract view of marriage may be ascribed in part to their hatred of the Papacy and ritualism, and their determination to escape the conclusion that marriage was a sacrament. By no people have the marriage vows been more sacredly performed than by ours down to a period, at all events, comparatively recent.

We are then to consider marriage not as a contract in the ordinary acceptation of the term; but as a contract *sui generis,* if, indeed, it be a contract at all; as an agreement to enter into a solemn relation which imposes its own terms. On the one hand discarding the unwarranted dogmas of the church of Rome, by which marriage is elevated to the character of a sacrament, on the

other we repudiate that dry definition with which the lawgiver or jurist sometimes seeks to impose upon the natural instincts of mankind. We adopt such views as the distinguished Lord Robertson held.[9] And Judge Story observes of marriage: "It appears to me something more than a mere contract. It is rather to be deemed an institution of society founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of obligation, different from what belongs to ordinary contracts."[10] So Fraser, while defining marriage as a contract, adds in forcible language: "Unlike other contracts, it is one instituted by God himself, and has its foundation in the law of nature. It is the parent, not the child, of civil society."[11] And we may add that a recent American text-writer, of high repute upon the subject, not only pronounces for this doctrine, after a careful examination of all the authorities, but ascribes the chief embarrassment of American tribunals, in questions arising under the conflict of marriage and divorce laws, to the custom of applying the rules of ordinary contracts to the marriage relation.[12]

Marriage is something more than a mere contract as when the contract to marry is executed by the marriage a relation between the parties is created which they cannot change. It is an institution in the maintenance of which in its purity the public is deeply interested.[13]

§ 1074. Public Regulation of Marriage.

That a State legislature is not precluded from regulating the marriage institution under any constitutional interdiction of acts impairing the obligation of contracts, or interfering with private rights and immunities, has frequently been asserted.[14] And as to

9. Duntze v. Levett, Ferg. 68, 385, 397; 3 Eng. Ec. 360, 495, 502.
10. Story Confl. Laws, § 108 *n*.
11. 1 Fras. Dom. Rel. 87.
12. See Dickson v. Dickson, 1 Yerg. 110, per Catron, J.; Ditson v. Ditson, 4 R. I. 87, per Ames, C. J.
13. Maynard v. Hill, 125 U. S. 190.
14. Maguire v. Maguire, 7 Dana, 181; Green v. State, 58 Ala. 190;

the private regulation of their property rights, by the contract of parties to a marriage, that, of course, is to be distinguished from their marriage, which may take place without any property regulation whatever.[15] Marriage is fully under public regulation[16] and the State may declare what marriages between its own citizens shall be void.[17]

§ 1075. Mutual Consent.

Marriage requires mutual consent.[18]

§ 1076. Necessity of Consummation.

The validity of a marriage properly solemnized is not affected by an ante-nuptial agreement of the parties not to live together[19] or by the fact that the marriage was never consummated.[20] Con-

Frasher v. State, 3 Tex. App. 263; Rugh v. Ottenheimer, 6 Ore. 231; Adams v. Palmer, 51 Me. 480.

15. Lord Stowell, in Lindo v. Belisario, 1 Hag. Con. 216; 1 Bish. Mar. & Div., 5th ed., § 14.

16. *In re* Gregorson's Estate, 160 Cal. 21, 116 P. 60; Cohen v. Cohen, 84 A. 122; Caras v. Hendrix, 62 Fla. 446, 57 So. 345; Eaton v. Eaton, 66 Neb. 676, 92 N. W. 995, 60 L. R. A. 605; Blakeslee v. Blakeslee (Nev.), 168 P. 950 (marriage status of own citizens); Schumacher v. Great Northern Ry. Co., 23 N. D. 231, 136 N. W. 85; Kitzman v. Kitzman, 167 Wis. 308, 166 N. W. 789 (marriage of epileptic annulled).

An exception of those of the Jewish faith from the prohibition against marriage of uncle and niece does not contravene the provision of the constitution that one's religious conviction shall not enlarge his civil capacity. Fensterwald v. Burk, 129 Md. 131, 98 A. 358.

17. Lanham v. Lanham, 136 Wis. 360, 117 N. W. 787, 17 L. R. A. (N. S.) 804.

18. Hooper v. McCaffery, 83 Ill. App. 341 (subsequent cohabitation may indicate that marriage intended); Le Suer v. Le Suer, 122 Minn. 407, 142 N. W. 593; Rundle v. Pegram, 49 Miss. 751; Kutch v. Kutch, 88 Neb. 114, 129 N. W. 169 (consent of competent parties); Dorgeloh v. Murtha, 156 N. Y. S. 181, 92 Misc. 279; Grigsby v. Reib, 153 S. W. 1124, affirming judgment (Civ. App.), 139 S. W. 1027. As to common-law marriage see *post*, § 1169.

19. (1909) Reifschneider v. Reifschneider, 241 Ill. 92, 89 N. E. 255, affirming judgment (1908). 144 Ill. App. 119; Franklin v. Franklin, 154 Mass. 515, 28 N. E. 681, 13 L. R. A. 843, 26 Am. St. R. 266.

20. Williams v. Williams, 130 N. Y. S. 875, 71 Misc. 590; Thompson v. Thompson (Tex. Civ. App.), 202 S. W. 175, 203 S. W. 939.

summation will be presumed from cohabitation even for a short time.[21]

§ 1077. Agreement Between Parties That Marriage Not Binding.

A valid marriage is not rendered void merely because the parties have at some prior time agreed that the marriage should be invalid[22] or merely because one or both of the parties did not intend the marriage to be permanent.[23]

§ 1078. Invalid Agreement That No Cohabitation Should Follow Marriage.

An ante-nuptial agreement that no cohabitation should follow the marriage is void as against public policy and either party may repudiate it after marriage.[24]

§ 1079. Eugenics Statute.

The State of Wisconsin did in 1913 pass a law widely known as the eugenics statute requiring from men only a certificate of freedom from venereal disease before a license to marry would be issued. This law was widely debated and sharply fought in the legislature and after its passage its constitutionality was attacked.

The court held that the power of the State to control and regulate by reasonable laws the marriage relation and to prevent the contracting of marriage by persons afflicted with loathsome or hereditary diseases which are liable either to be transmitted to the spouse or inherited by the offspring, or both, must be regarded as undeniable. Society has a right to protect itself from extinction and its members from a fate worse than death.

The court holds that the fact that the law applies to men only does not make it unconstitutional as it is common knowledge that

21. Beckermeister v. Beekermeister, 170 N. Y. S. 22.

22. Hills v. State, 61 Neb. 589, 85 N. W. 836, 57 L. R. A. 155.

23. Wimbrough v. Wimbrough, 125 Md. 619, 94 A. 168; Donohue v. Donohue, 159 Mo. App. 610, 141 S. W. 465.

24. De Vries v. De Vries, 195 Ill. App. 4.

practically all women who marry are pure while men are not and the evil sought to be remedied is caused by diseased men marrying decent women.

The law requires the examining physician to certify that the applicant is free from venereal disease as nearly as can be ascertained by physical examination and by the application of the recognized clinical and laboratory tests of scientific search. There was evidence that the recognized test for syphilis was the Wasserman test which required elaborate instruments, that practically none of the physicians of the State were prepared to use it and that the expense of the test was all out of proportion to the legal fee fixed of three dollars. The court holds, however, that as the Wasserman test is unnecessary in the great majority of cases it could not have been required and that there is nothing unconstitutional about the act.[25]

§ 1080. Effect on Revocation of Will or Discharge of School Teachers.

At common law a will made by a *feme sole* was revoked by her subsequent marriage as marriage destroyed the ambulatory character of the will and left it no longer subject to the wife's control, but statutes conferring full testamentary capacity on married women have removed the reason for the rule and consequently the rule itself has ceased and marriage no longer revokes the will of an unmarried woman.[26]

There are cases, however, holding that the marriage of a woman creates such a change in her circumstances with new moral duties and obligations that it does of itself revoke the will,[27] but this creates an inconsistency as the marriage of a man does not revoke

25. Peterson v. Widule, 157 Wis. 641, 147 N. W. 966, 52 L. R. A. (N. S.) 778. (This case is discussed in 27 Harvard Law Rev. 573, and in 28 Harvard Law Rev. 112.)

26. Lee v. Blewett (Miss.), 77 So. 147, L. R. A. 1918B, 941.

27. Blodgett v. Moore, 141 Mass. 75, 5 N. E. 470; Colcord v. Conroy, 40 Fla. 97, 23 So. 561.

his will[28] and the majority of the courts take the view that marriage is not such change of circumstances as to revoke the will of a woman.[29]

Under statutes giving boards the right to discharge school teachers only for reasonable cause the marriage of a woman school teacher is not a reasonable cause for her discharge. The act of marriage does not of itself impair the competency of teachers as many married women teachers are employed.[30]

28. Hulett v. Carey, 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384.

29. *In re* Emery, 81 Me. 275, 17 A. 68; Noyes v. Southworth, 55 Mich. 173, 54 Am. R. 359, 20 N. W. 891; Ward's Will, 70 Wis. 251, 5 Am. St. R. 174, 35 N. W. 731.

30. Richards v. District School Board (Ore.), 153 P. 482, L. R. A. 1916C, 789.

See People v. Board of Education, 212 N. Y. 463, 106 N. E. 307, holding that absence of a woman teacher during confinement may authorize the board to discharge her for neglect of duty.

CHAPTER II.

VOID AND VOIDABLE MARRIAGES.

SECTION 1081. Distinction.
1082. Putative Marriage.
1083. Marriage Prohibited by Statute.
1084. Ratification of Void Marriage by Cohabitation.
1085. Property Rights Arising from Void Marriage.
1085a. Duty to Support Plural Wives.
1086. Effect of Death.

§ 1081. Distinction.

A distinction is made at law between void and voidable marriages. This distinction, which appears to have originated in a conflict between the English ecclesiastical and common-law courts, was first announced in a statute passed during the reign of Henry VIII; and it is also to be found in succeeding marriage and divorce acts down to the present day. The distinction of void and voidable applies not to the legal consequences of an imperfect marriage, once formally dissolved, but to the status of the parties and their offspring before such dissolution. A void marriage is a mere nullity, and its validity may be impeached in any court, whether the question arise directly or collaterally, and whether the parties be living or dead. But a voidable marriage is valid for all civil purposes until a competent tribunal has pronounced the sentence of nullity, upon direct proceedings instituted for the purpose of setting the marriage aside. Hence we see that, while a void marriage makes cohabitation at all times unlawful and bastardizes the issue, a voidable marriage protects intercourse between the parties for the time being, furnishes the usual incidents of survivorship, such as curtesy and dower, and encourages the propagation of children. But the moment the sentence of nullity is pronounced, the shield of the law falls, the incidents vanish, and innocent offspring are exposed to the world as bastards; and herein is the greatest hardship of a voidable marriage.

The old rule is that civil disabilities, such as idiocy and fraud, render a marriage void; while the canonical impediments, such as consanguinity and impotence, make it voidable only. This test was never a clear one, and it has become of little practical consequence at the present day. Statutes both in England and America have greatly modified the ancient law of valid marriages, and it can only be affirmed in general terms that the legislative tendency is to make marriages voidable rather than void, wherever the impediment is such as might not have been readily known to both parties before marriage; and where public policy does not rise superior to all considerations of private utility. Modern civilization strongly condemns the harsh doctrine of *ab initio* sentences of nullity; and such sentences have now in general a prospective force only, in order that rights already vested may remain unimpaired, and, still more, that children may not suffer for the follies of their parents,[31] and it is the general rule to-day that a marriage legally celebrated is considered valid until annulled in a direct action.[32]

§ 1082. Putative Marriage.

A "putative marriage" is one which is in reality null, but which has been contracted in good faith by the two parties or by one of them.[33]

§ 1083. Marriage Prohibited by Statute.

A marriage in contravention of a statute which merely prohibits the marriage is voidable only,[34] as unlawful marriages are not

31. Shelf. Mar. & Div. 154; *Ib.* 479-484; 1 Bl. Com. 434. See Stat. 5 & 6, Will. IV., ch. 54; 2 N. Y. Rev. Sts. 139, § 6; Mass. Gen. Stats., ch. 106, § 4; Harrison v. State, 22 Md. 468; Bowers v. Bowers, 10 Rich. Eq. 551; Pingree v. Goodrich, 41 Vt. 47; Divorce, *post.* Held *contra* as to the marriage of a negro and white person. Carter v. Montgomery, 2 Tenn. Ch. 216. And see *post,* § 1108, as to impotence or physical incapacity.

32. State v. Loyacano, 135 La. 945, 66 So. 307.

33. Walker v. Walker's Estate (Tex. Civ. App.), 136 S. W. 1145.

34. Gould v. Gould, 78 Conn. 242, 61 A. 604, 2 L. R. A. 531 (epilep-

void unless declared so by statute,[35] but the statute may be so drawn as to render the marriage void *ab initio*.[36]

§ 1084. Ratification of Void Marriage by Cohabitation.

A marriage void on account of the incapacity of the parties at the time may be ratified by their continued cohabitation after the removal of the impediment,[37] although the opposite view is often

ties); Tyler v. Andrews, 40 App. D. C. 100 (although statute provided that certain marriages "shall be void"); Delpit v. Young, 51 La. Ann. 923, 25 So. 547; State v. Yoder, 113 Minn. 503, 130 N. W. 10; Hayes v. Rollins, 68 N. H. 191, 44 A. 176 (cousins); State v. Smith, 101 S. C. 293, 85 S. E. 958 (to daughter of half-sister); Thompson v. Thompson (Tex. Civ. App.), 202 S. W. 175, 203 S. W. 939; Kitzman v. Kitzman, 167 Wis. 308, 166 N. W. 789 (marriage of epileptic voidable).

35. Park v. Barron, 20 Ga. 702, 65 Am. Dec. 641.

36. Arado v. Arado (Ill.), 117 N. E. 816, 205 Ill. App. 261 (between first cousins); Williams v. McKeene, 193 Ill. App. 615 (between man and daughter of his half-sister); Moore v. Moore, 30 Ky. Law Rep. 383, 98 S. W. 1027 (of negro and white woman); McIlvain v. Scheibley, 109 Ky. 455, 59 S. W. 498, 22 Ky. Law Rep. 942 (with niece).

Prescription cannot be successfully invoked in aid of a marriage void *ab initio*, as in contravention of public policy and good morals. Succession of Gabisso, 119 La. 704, 44 So. 438; Carter v. Veith, 139 La. 534, 71 So. 792 (between white and colored persons); Fearnow v. Jones, 34 Okla. 694, 126 P. 1015 (incestuous).

37. Powers v. Powers, 138 Ga. 65, 74 S. E. 759 (infancy); Lewis v. King, 180 Ill. 259, 54 N. E. 330 (slaves); Stein v. Stein, 66 Ill. App. 526; Matthes v. Matthes, 198 Ill. App. 515 (minors); Lee v. Lee, 150 Ia. 611, 130 N. W. 128 (marriage within time prohibited for divorced persons to remarry); Sherman v. Sherman, 156 N. W. 301 (duress); Boutterie v. Demarest, 126 La. 278, 52 So. 492, 27 L. R. A. (N. S.) 805 (duress); Succession of Walker, 121 La. 865, 46 So. 890 (slaves); Meyer v. Meyers, 139 La. 752, 72 So. 218 (slave marriage ratified by cohabitation after emancipation); Gross v. Gross, 96 Mo. App. 486, 70 S. W. 393 (insanity); Schaffer v. Krestovnikow (N. J. Ch.), 102 A. 246; Robinson v. Robinson, 83 N. J. Eq. 150, 90 A. 311; G—— v. G——, 67 N. J. Eq. 30, 56 A. 736 (impotency); Herrman v. Herrman, 156 N. Y. S. 688, 93 Misc. 315 (infancy — one act of sexual intercourse enough); Taylor v. Taylor, 55 N. Y. S. 1052, 28 Civ. Proc. R. 323, 25 Misc. 566; Long v. Baxter, 138 N. Y. S. 505, 77 Misc. 630 (infancy); Merrell v. Moore, 47 Tex. Civ. App. 200, 104 S. W. 514 (duress); Kinney v. Tri-State Telephone Co. (Tex. Civ. App.) 201 S. W. 1180.

While the duress inducing the mar-

taken;[38] and where relations were begun while a prior marriage of one of the parties was in existence their continued cohabitation after the end of the prior marriage is of no force.[39]

§ 1085. Property Rights Arising from Void Marriage.

One who lives with a man as his wife cannot maintain a petition in equity, on learning that the marriage is not legal, to compel a division of the property acquired with their joint earnings.[40]

One who conceals from the other his prior existing marriage gains no property rights by the second marriage.[41]

§ 1085a. Duty to Support Plural Wives.

There is no legal obligation to support plural wives.[42]

§ 1086. Effect of Death.

When once set aside, the marriage is treated as void *ab initio;* but unless the suit for nullity reaches its conclusion during the lifetime of both parties, all proceedings fall to the ground, and both survivor and offspring stand as well as though the union had been lawful from its inception.[43]

riage is still operative, acts taking place will not be a ratification. Fowler v. Fowler, 131 La. 1088, 60 So. 694; Avakian v. Avakian, 69 N. J. Eq. 89, 60 A. 521.

38. Teter v. Teter, 88 Ind. 494; Commonwealth v. Stevens, 196 Mass. 280, 82 N. E. 33 (marriage before divorce became absolute); Sims v. Sims, 121 N. C. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. R. 665 (lunacy); McCullen v. McCullen, 147 N. Y. S. 1069, 162 App. Div. 599; Petit v. Petit, 91 N. Y. S. 979, 45 Misc. 566 (existing prior marriage); Earle v. Earle, 126 N. Y. S. 317.

39. *In re* Riley's Estate (Mont.), 165 P. 1105 (where no ceremony at second marriage).

40. Schmitt v. Schneider, 109 Ga. 628, 35 S. E. 145. See Murchison v. Greene, 128 Ga. 339, 57 S. E. 709, 11 L. R. A. (N. S.) 702. See *in re* Eysel's Estate, 121 N. Y. S. 1095, 65 Misc. 432 (joint account presumed joint property although marriage unlawful); *contra,* Lawson v. Lawson, 30 Tex. Civ. App. 43, 69 S. W. 246 (relation held a partnership); Green v. Green (Tex. Civ. App.), 167 S. W. 263; Ft. Worth & R. G. Ry. Co. v. Robertson, 55 Tex. Civ. App. 309, 121 S. W. 202.

41. Davis v. Cummins (Mo.), 195 S. W. 752.

42. Riddle v. Riddle, 26 Utah, 268, 72 P. 1081.

43. 1 St. 32 Hen. VIII., ch. 38.

One difference between a void marriage and a voidable marriage is that the former may be collaterally attacked after death by heirs, while in case of a voidable marriage it is open to attack only in the lifetime of both spouses, the survivor being entitled to all the rights of a surviving spouse as against the other's heirs.[44]

44. Bruns v. Cope, 105 N. E. 471; Henderson v. Ressor, 265 Mo. 718, 178 S. W. 175.

CHAPTER III.

DISQUALIFICATION BY BLOOD OR AFFINITY.

SECTION 1087. Nature and History.
1088. English Rule.
1089. Rule in This Country.
1090. Affinity by Marriage.
1091. Voidable or Void.
1092. Knowledge of Parties.

§ 1087. Nature and History.

On no point have writers of all ages and countries been more united than in the conviction that nature abhors, as vile and unclean, all sexual intercourse between persons of near relationship. But on few subjects have they differed more widely as in the application of this conviction. Among Eastern nations, since the days of the patriarchs, practices have prevailed which to Christian nations and in days of civilized refinement, seem shocking and strange. The difficulty then is, not in discovering that there is some prohibition by God's law, but in ascertaining how far that prohibition extends. This difficulty is manifested in our language by the use of two terms — consanguinity and affinity; one of which covers the terra firma of incestuous marriages, the other offers debatable ground. The disqualification of consanguinity applies to marriages between blood relations in the lineal or ascending and descending lines. There can be but one opinion concerning the union of relations as near as brother and sister. The limit of prohibition among remote collateral kindred has, however, been differently assigned in different countries. The English canonical rule is that of the Jewish law. The Greeks and Romans recognized like principles, though with various modifications and alterations of opinion.

§ 1088. English Rule.

The church of the Middle Ages found in the institution of marriage, once placed among the sacraments, a most powerful lever of social influence. The English ecclesiastical courts made use of this disqualification, extending it to the seventh degree of canonical reckoning in some cases, and beyond all reasonable bounds.[45] So intolerable became this oppression, that a statute passed in the time of Henry VIII forbade these courts thenceforth to draw in question marriages without the Levitical degree, "not prohibited by God's law."[46] Under this statute, which is still essentially in force in England, the impediment has been treated as applicable to the whole ascending and descending line, and further, as extending to the third degree of the civil reckoning inclusive; or in other words, so as to prohibit all marriages nearer than first cousins. Archbishop Parker's table of degrees, which recognizes these limits, has been, since 1563, the standard adopted in the English ecclesiastical courts.[47] The statute prohibition includes legitimate

45. In some Roman Catholic countries — *e. g.*, Portugal — the marriage of first cousins is still pronounced incestuous. See Sottomayor v. De Barros, L. R. 2 P. D. 81; L. R. 3 P D. 1.

46. Stat. 32 Hen. VIII, ch. 38. See Bish. Mar. & Div., 5th ed., §§ 106, 107; 2 Kent Com. 82, 83; Shelf. Mar. & Div. 163 *et seq.;* Wing v. Taylor, 2 Swab. & T. 278, 295.

47. 1 Bish. Mar. & Div., 5th ed., § 318; Butler v. Gastrill, Gilb. Ch. 156. According to this table,—

A man may not marry his

1. Grandmother.
2. Grandfather's wife.
3. Wife's grandmother.
4. Father's sister.
5. Mother's sister.
6. Father's brother's wife.
7. Mother's brother's wife.
8. Wife's father's sister.
9. Wife's mother's sister.
10. Mother.
11. Step-mother.
12. Wife's mother.
13. Daughter.
14. Wife's daughter.

A woman may not marry her

1. Grandfather.
2. Grandmother's husband.
3. Husband's grandfather.
4. Father's brother.
5. Mother's brother.
6. Father's sister's husband.
7. Mother's sister's husband.
8. Husband's father's brother.
9. Husband's mother's brother.
10. Father.
11. Step-father.
12. Husband's father.
13. Son.
14. Husband's son.

as well as illegitimate children, and half-blood kindred equally with those of the whole blood.[48]

§ 1089. Rule in This Country.

In this country various rules have been laid down by statute as to what is an incestuous marriage, and marriages have been prohibited between cousins,[49] uncle and niece.[50]

§ 1090. Affinity by Marriage.

The English law places affinity on the same footing as consanguinity as an impediment. Affinity is the relationship which arises from marriage between a husband and his wife's kindred, and *vice versa*. It is shown that while the marriage of persons allied by blood produces offspring feeble in body and tending to insanity, that of persons connected by affinity leads to no such result; and further, that consanguinity has been everywhere recognized as an impediment, but not affinity. The worst that can probably be said of the latter is, that it leads to confusion of domestic rights and duties. No question has been discussed with more earnestness in both England and America, with less positive result, than one which turns upon this very distinction; namely, whether a man may marry his deceased wife's sister. This question has received a favorable response in Vermont, and

48. 1 Bish. Mar. & Div., 5th ed., §§ 315, 317; Reg. v. Brighton, 1 B. & S. 447.

49. Arado v. Arado, 281 Ill. 123, 117 N. E. 816 (void and not voidable); *In re* Wittick's Estate, 164 Ia. 485, 145 N. W. 913; Blaisdell v. Bickum, 139 Mass. 250, 1 N. E. 281 (under New Hampshire law); Schofield v. Schofield, 51 Pa. Super. Ct. 564; McClain v. McClain, 40 Pa. Super. Ct. 248; State v. Nakashima, 62 Wash. 686, 114 P. 894. As to incestuous marriages see full notes in L. R. A. 1916C, 720 and 752.

50. Williams v. McKeene, 193 Ill. App. 615 (bars marriage with daughter of half-sister); Weisberg v. Weisberg, 98 N. Y. S. 260, 112 App. Div. 231, 18 N. Y. Ann. Cas. 263 (not incestuous apart from statute). See Weisberg v. Weisberg, 98 N. Y. S. 260, 112 App. Div. 231, 18 N. Y. Ann. Cas. 263 (not where marriage of niece forbidden by statute after marriage took place).

Marriage between an uncle and niece has been treated as incestuous. Harrison v. State, 22 Md. 468; Bowers v. Bowers, 10 Rich. Eq. 551.

universally in this country.[51] But in England such marriages were deemed incestuous, and within the prohibition of God's law, and the House of Lords resisted all legislative change in this respect,[52] until 1907, when the passage of the Deceased Wife's Sister Law made such marriages valid. Even after the passage of this act a minister refused to administer communion to a couple who had married under its provisions on the ground that they were "notorious evil livers";[53] and it has been recently held at *nisi prius* that a marriage by a woman with her deceased husband's brother is void.[54]

Statutes prohibiting unions between persons related by marriage are strictly construed in this country, as, for example, a statute prohibiting a marriage between a man and his son's wife does not prohibit marriage with his son's widow,[55] and under a statute prohibiting a marriage between a man and his wife's daughter a marriage is valid between a man and the daughter of his divorced wife, as when the divorce was granted the daughter ceased to be the daughter of his wife.[56]

§ 1091. Voidable or Void.

Marriages within the forbidden degrees of consanguinity were formerly only voidable in English law; but by modern statutes

51. Blodget v. Brinsmaid, 9 Vt. 27; Paddock v. Wells, 2 Barb. Ch. 331. Collamer, J., in Blodget v. Brinsmaid, makes this ingenius distinction: "The relationship by consanguinity is, in its nature, incapable of dissolution; but the relationship by affinity ceases with the dissolution of the marriage which produced it. Therefore, though a man is, by affinity, brother to his wife's sister, yet, upon the death of his wife, he may lawfully marry her sister."

52. Hill v. Good, Vaugh. 302; Harris v. Hicks, 2 Salk. 548; Shelf. Mar. & Div., pp. 172, 178; 2 Kent Com. 84, note, and authorities cited; Reg. v. Chadwick, 12 Jur. 174; 11 Q. B. 173; Pawson v. Brown, 41 L. T. (N. S.) 339; *Ex parte* Naden, L. R. 9 Ch. 670. And see Commonwealth v. Perryman, 2 Leigh, 717, as to the Virginia statute on this point.

53. Thomson v. Dibdin (1912), A. C. 533.

54. See 23 Law Notes, 145.

55. Houston Oil Co. of Texas v. Griggs (Tex. Civ. App.), 181 S. W. 833.

56. Back v. Back, 148 Ia. 223, 125 N. W. 1009, L. R. A. 1916C, 752.

they have been made null and void. In this country they are generally pronounced void by statute (that is to say, void from the time the sentence is pronounced [57]), and the offending parties are liable to imprisonment. But with regard to marriages among relatives by affinity, the rule is not so stringent as in England.[58]

Under statutes declaring a marriage between first cousins absolutely void both where the marriage was celebrated and where the parties live, such a marriage is void and confers no rights on the widow to homestead, and the nullity may be set up in the homestead proceedings.[59]

§ 1092. Knowledge of Parties.

The fact that the marriage was entered into knowingly by the parties does not prevent it from being declared void as incestuous.[60]

57. That is to say, not void *ab initio*. See *supra*, § 1081; Harrison v. State, 22 Md. 468. And see Bowers v. Bowers, 10 Rich. Eq. 551; Parker's Appeal, 8 Wright, 309, where an incestuous marriage is treated as simply voidable.

58. 2 Kent Com. 83, 84, and notes; 1 Bish. Mar. & Div., 5th ed., §§ 312-320; Regina v. Chadwick, 12 Jur. 174; Sutton v. Warren, 10 Met. 451; Bonham v. Badgley, 2 Gilm. 622; Wightman v. Wightman, 4 Johns. Ch. 343; Butler v. Gastrill, Gilb. Ch. 156; Burgess v. Burgess, 1 Hag. Con. 384; Blackmore v. Brider, 2 Phillim. 359.

59. Fearnnow v. Jones, 34 Okla. 694, 126 P. 1015, L. R. A. 1916C, 720, note (showing that as a general rule such marriages are voidable only).

60. Martin v. Martin, 54 W. Va. 301, 46 S. E. 120.

CHAPTER IV.

DISQUALIFICATION BY RACE, RELIGION, ETC.

SECTION 1093. At Common Law.
1094. Slaves.
1095. Indian Marriages.
1096. Marriages Between White and Colored Persons.
1097. Religious Disqualification.
1098. Persons Living in Immorality.

§ 1093. At Common Law.

Race, color, and social rank do not appear to constitute an impediment to marriage at the common law, nor is any such impediment now recognized in England.[61]

§ 1094. Slaves.

Slaves were incapable of marriage as of entering into other contracts,[62] although such a marriage may have a certain moral force and may be confirmed after emancipation,[63] and a customary marriage of slaves is voidable only, and where not disaffirmed the children inherit.[64]

A statute permitting the marriage of slaves with the consent of their masters did not dispense with the celebration of nuptials,[65] but a statute declaring certain negroes husband and wife does not require an express agreement that the parties take one another as husband and wife.[66]

61. 1 Burge Col. & For. Laws, 138.

62. Lindsey's Devisee v. Smith, 131 Ky. 176, 114 S. W. 779; Merrick v. Betts, 214 Mass. 223, 101 N. E. 131; Napier v. Church, 177 S. W. 56; Lemons v. Harris, 115 Va. 809, 80 S. E. 740.

63. Scott v. Raub, 88 Va. 721, 14 S. E. 178.

64. Middleton v. Middleton, 221 Ill. 623, 77 N. E. 1123. See Johnson's Heirs v. Raphael, 117 La. 967, 42 So. 470.

65. Johnson's Heirs v. Raphael, 117 La. 967, 42 So. 470.

66. Lemons v. Harris, 115 Va. 809, 80 S. E. 740.

The thirteenth article of amendment to the Constitution gives Congress power to enforce the abolition of slavery "by appropriate legislation." As to persons formerly slaves, there are now acts of Congress which legitimate their past cohabitation, and enable them to drop the fetters of concubinage. And the manifest tendency of the day is towards removing all legal impediments of rank and condition, leaving individual tastes and social manners to impose the only restrictions of this nature.[67]

Accordingly we now find in most Southern States, where slavery existed until abolished by supreme authority of the United States, statutes which expressly legalize the marriages of former slaves and persons of the colored race who continued to cohabit as husband and wife after such emancipation, and which legitimate their previous offspring.[68] But subsequent emancipation would not be thought to resuscitate a slave marriage or cohabitation previously dissolved;[69] nor would what slaves understood to be their merely illicit companionship come within the purview of such statutes.[70]

Where slaves are married and continue to live together as husband and wife after emancipation their marriage will be recognized,[71] as will be that of a slave who ran away to a free State and was there married before the emancipation of the slaves,[72] and the marriage of slaves may be proved by reputation.[73]

67. Act July 25, 1866, ch. 240; Act June 6, 1866, ch. 106, § 14. And see 15th Amendment U. S. Const.; Stewart v. Munchandler, 2 Bush (Ky.), 278; State v. Harris, 63 N. C. 1.

68. Scoggins v. State, 32 Ark. 205; Jones v. Jones, 45 Md. 144; Hayden v. Ivey, 51 Ala. 381; Brown v. McGee, 12 Bush, 428; McConico v. State, 49 Ala. 6; Jackson v. State, 53 Ala. 472. Such acts may apply to persons born free. Francis v. Francis, 31 Gratt. 283.

69. See Pierre v. Fontenette, 25 La. Ann. 617.

70. Floyd v. Calvert, 53 Miss. 37.

71. Marzette v. Cronk, 141 La. 437, 75 So. 107; Sterrett v. Samuel, 108 La. 346, 32 So. 428; State v. Melton, 120 N. C. 591, 26 S. E. 933; Wood v. Cole, 25 Tex. Civ. App. 378, 60 S. W. 992; Waff v. Sessums, 28 Tex. Civ. App. 183, 66 S. W. 865.

72. Irving v. Ford, 179 Mass. 216, 60 N. E. 491.

73. Lindsey's Devisee v. Smith, 131

§ 1095. Indian Marriages.

Marriages between Indians while members of Indian tribes will be sustained if in accordance with Indian customs,[74] but after they become citizens of a State their marriage must then comply with State law.[75]

"The courts of the American Union have, from an early time, recognized the validity of marriages contracted between the members of any Indian tribe in accordance with the laws and customs of such tribe, where the tribal relations and government existed at the time of the marriage, and there was no Federal statute rendering the tribal customs or laws invalid; and such marriages between a member of an Indian tribe and a white person not a member of such tribe have been held and regarded as valid, the same as such marriages between members of the tribe. And the same effect is given to the dissolution of the marriage under the customs of the tribe as is given to the marriage relation itself." [76] Such a marriage is not a common-law marriage but a legal marriage according to the customs of the Indians, which customs are the laws recognized by Congress concerning and regulating their domestic relations.[77]

A marriage between an Indian woman and a half-breed member of an Indian tribe is not a "common-law" marriage, but a marriage under the laws and customs of the tribe to which the

Ky. 176, 114 S. W. 779. See Watson v. Ellerbe, 77 S. C. 232, 57 S. E. 855 (short relationship presumed concubinage as compared with longer presumed a marriage).

74. Yakima Joe v. To-Is-Lap, 191 F. 516; McKay v. Kalyton, 204 U. S. 458, 27 S. Ct. 346, 51 L. Ed. 566, revg. Kalyton v. Kalyton, — Ore. —, 74 P. 491; Moore v. Wa-me-go, 72 Kan. 169, 83 P. 400; Ortley v. Ross, 78 Neb. 339, 110 N. W. 982; People v. Rubin, 98 N. Y. S. 787; Oklahoma Land Co. v. Thomas, 34 Okla. 681, 127 P. 8; Chancey v. Whinnery, 147 P. 1036; Meagher v. Harjo (Okla.), 179 P. 757; Johnson v. Dunlap (Okla.), 173 P. 359; James v. Adams (Okla.), 155 P. 1121; Buck v. Branson, 34 Okla. 807, 127 P. 436; Butler v. Wilson, 153 P. 823; Henry v. Taylor, 16 S. D. 424, 93 N. W. 641.

75. Moore v. Wamego, 72 Kan. 169, 83 P. 400.

76. Cyr v. Walker, 29 Okla. 289, 116 P. 934, 35 L. R. A. (N. S.) 795.

77. Buck v. Branson, 34 Okla. 807, 127 P. 436, 50 L. R. A. (N. S.) 876.

parties belonged, and will be recognized as a valid marriage although by mere purchase from the father of the woman.[78]

§ 1096. Marriages Between White and Colored Persons.

By local statutes in some of the United States, intermarriage has long been discouraged between persons of the negro, Indian, and white races.[79] And Southern policy, furthermore, still treats the amalgamation of races with great disfavor; not only prohibiting marriage between whites and negroes, as before the downfall of slavery, but in some States punishing the offending parties as criminals;[80] though apparently regarding the colored mistresses of white men more leniently.[81]

Where prohibitions exist against marriages between white and colored persons by statute such marriages are absolutely void,[82] as are marriages between white persons and Indians.[83]

§ 1097. Religious Disqualification.

To the same head we may, perhaps, refer another disqualification which existed in Great Britain at a period when differences of religious belief were made the foundation of civil disabilities.

78. La Framboise v. Day (Minn.), 161 N. W. 529, L. R. A. 1917D, 571.

79. See Bailey v. Fiske, 34 Me. 77; State v. Hooper, 5 Ire. 201; State v. Brady, 9 Humph. 74; Barkshire v. State, 7 Ind. 389. One drop less than one fourth negro blood saves from the taint in Virginia. McPherson v. Commonwealth, 28 Gratt. 939.

80. And this is held not to contravene the Constitution of the United States or civil rights legislation by Congress. See State v. Gibson, 36 Ind. 389; State v. Hairston, 63 N. C. 451; State v. Kennedy, 76 N. C. 251; Green v. State, 58 Ala. 190; Scott v. State, 39 Ga. 321; Frasher v. State, 3 Tex. App. 263; State v. Bell, 7 Baxter, 9; Carter v. Montgomery, 2 Tenn. Ch. 216; Kinney v. Commonwealth, 30 Gratt. 858. Cf. Honey v. Clark, 37 Tex. 686. Under the *lex loci* such marriages are sometimes upheld when contracted elsewhere. See *post*, § 1258 *et seq.*

81. Moore v. State, 7 Tex. App. 608.

82. Succession of Dreux (La. 1880), Man. Unrep. Cas. 217; Keen v. Keen, 184 Mo. 358, 83 S. W. 526, 201 U. S. 319, 26 S. Ct. 494, 50 L. Ed. 772; Marre v. Marre, 184 Mo. App. 198, 168 S. W. 636. See Succession of Fortier, 51 La. Ann. 1562, 26 So. 554.

83. *In re* Walker's Estate, 5 Ariz. 70, 46 P. 67.

In a few recent American cases, statutes of the eighteenth century were set up to show that, abroad, marriage between a Roman Catholic and Protestant was forbidden; but the suggestion received little encouragement, and clear proof to the point was not actually furnished.[84]

§ 1098. Persons Living in Immorality.

The fact that two persons are living together in illicit relationship does not render their marriage void.[85]

84. Commonwealth v. Kenney, 120 Mass. 387; Philadelphia v. Williamson, 10 Phila. 176. The statute 19 Geo. II., ch. 13, to this effect, has partial reference to the solemnization of marriage by a Popish priest. These are disabilities imposed by a Protestant parliament, it is worth observing.

85. Foss v. Brown 151 Mich. 119, 114 N. W. 873, 14 Det. Leg. N. 865.

CHAPTER V.

MENTAL CAPACITY.

SECTION 1099. In General.
1100. Capacity to Contract as Test.
1101. Weakness of Mind.
1102. Insanity.
1103. Lucid Intervals; Temporary Insanity, &c.
1104. Marriages, How Annulled for Insanity; Marriages Confirmed.
1105. Drunkenness.
1106. Deaf and Dumb Persons.
1107. Whether Marriage of Incompetents Void or Voidable.

§ 1099. In General.

No one can contract a valid marriage unless capable at the time of giving an intelligent consent. Hence the marriages of idiots, lunatics, and all others who have not the use of their understanding, are now treated as null; though the rule was formerly otherwise, from, perhaps, too great regard to the sanctity of the institution in the English ecclesiastical courts.[86]

§ 1100. Capacity to Contract as Test.

Marriage cannot be valid without mental capacity sufficient to contract[87] although by statute such marriages may be valid until annulled.[88]

A marriage may be annulled where one of the parties was at no time of sufficient mental capacity to make a contract or under-

86. See Lord Stowell in Turner v. Meyers, 1 Hag. Con. 414.

87. *In re* Gregorson's Estate, 160 Cal. 21, 116 P. 60.

There may be an exceptional case where one who is generally incapable of contracting may still enter into a lawful marriage. Park v. Barron, 20 Ga. 702, 65 Am. Dec. 641; Buchanan v. Buchanan, 103 Ga. 90, 29 S. E. 608; Hagenson v. Hagenson, 258 Ill. 197, 101 N. E. 606; Pyott v. Pyott, 191 Ill. 280, 61 N. E. 88; Inhabitants of Winslow v. Inhabitants of Troy, 97 Me. 130, 53 A. 1008; Sims v. Sims, 121 N. C. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. R. 665.

88. Dunphy v. Dunphy, 161 Cal. 87, 118 P. 445; Wilson v. Wilson, 104 Miss. 347, 61 So. 453; *In re* Jansa's

stand the nature of the marriage relation[89] but annulment will not be granted where this does not appear,[90] but mental weakness or unsoundness not sufficient to invalidate a contract will not avoid a marriage.[91]

§ 1101. Weakness of Mind.

Mere weakness of mind not amounting to insanity is not a ground for annulling a marriage. "It would be dangerous, perhaps, as well as difficult, to prescribe the precise degree of mental vigor, soundness, and capacity essential to the validity of such an engagement; which after all, in many cases, depends more on sentiments of mutual esteem, attachment, and affection, which the weakest may feel as well as the strongest intellects, than on the exercise of a clear, unclouded reason or sound judgment, or intelligent discernment and discrimination, and in which it differs in a very important respect from all other civil contracts."[92]

§ 1102. Insanity.

What degree of insanity will amount to disqualification is not easily determined; so varied are the manifestations of mental disorder at the present day, and so gradually does mere feebleness of intellect shade off into hopeless idiocy. Certain it is that a

Estate (Wis.), 171 N. W. 947 (marriage of epileptic voidable). See Payne v. Burdette, 84 Mo. App. 332.

89. Dunphy v. Dunphy, 161 Cal. 380, 119 P. 512; Henderson v. Ressor, 141 Mo. App. 540, 126 S. W. 203 (at time of marriage); Chapline v. Stone, 77 Mo. App. 523; Liske v. Liske, 135 N. Y. S. 176; Reed v. Reed, 175 N. Y. S. 264 (under statute action brought only by insane spouse); Coleman v. Coleman, 85 Ore. 99, 166 P. 47; Waughop v. Waughop, 82 Wash. 69, 143 P. 444. See Ryals v. Ryals, 130 La. 244, 57 So. 904.

90. Green v. Green (Fla.), 80 So. 739 (youth and inexperience is no ground for annulment); Kutch v. Kutch, 88 Neb. 114, 129 N. W. 169; Adams v. Scott, 93 Neb. 537, 141 N. W. 148; Svanda v. Svanda, 93 Neb. 404, 140 N. W. 777; Meekins v. Kinsella, 136 N. Y. S. 806, 152 App. Div. 32.

91. Aldrich v. Steen, 71 Neb. 33, 98 N. W. 445, 100 N. W. 311; Adams v. Scott, 93 Neb. 537, 141 N. W. 148 (test is power of consent).

92. Elzey v. Elzey, 1 Houst. (Del.) 308; Svanda v. Svanda, 93 Neb. 404, 140 N. W. 777, 47 L. R. A. (N. S.) 666.

person may enter into a valid marriage, notwithstanding he has a mental delusion on certain subjects, is eccentric in his habits, or is possessed of a morbid temperament, provided he displays soundness in other respects and can manage his own affairs with ordinary prudence and skill.[93] Every case stands on its own merits; but the usual test applied in the courts is that of fitness for the general transactions of life; for, it is argued, if a man is incapable of entering into other contracts, neither can he contract marriage.[94] This test is sufficiently precise for most purposes. Yet we apprehend the real issue is whether the man is capable of entering understandingly into the relation of marriage; for natural impulses are so strong that a man may know well the contract he assumes by the act of marriage, while he is not equally fit to enter into other engagements. There are two questions, however: first, whether the party understands the marriage contract; second, whether he is fit to perform understandingly the momentous obligations which that contract imposes; and both elements might well enter into the consideration of each case. "If any contract more than another," observes Lord Penzance in a recent English case, "is capable of being invalidated on the ground of the insanity of either of the contracting parties, it should be the contract of marriage — an act by which the parties bind their property and their persons for the rest of their lives."[95]

§ 1103. Lucid Intervals; Temporary Insanity, &c.

Marriage contracted during a lucid interval is at law deemed valid;[96] but the English statute provides that such marriages are

93. 2 Kent Com. 76; Browning v. Reane, 2 Phillim. 69; 1 Bish. Mar. & Div., 5th ed., §§ 124-142; Turner v. Meyers, 1 Hag. Con. 414; 4 Eng. Ec. 440; 1 Bl. Com. 438, 439.

94. Mudway v. Croft, 3 Curt. Ec. 671; Anon., 4 Pick. 32; Cole v. Cole, 5 Sneed, 57; Atkinson v. Medford, 46 Me. 510; Ward v. Dulaney, 23 Miss. 410; Elzey v. Elzey, 1 Houst. 308; McElroy's Case, 6 W. & S. 451. See 1 Bish. Mar. & Div., § 128; *Ex parte* Glen, 4 Des. 546.

95. Hancock v. Peaty, L. R. 1 P. & D. 335, 341.

96. Shelf. Mar. & Div. 197; Banker

void when a commission of lunacy has once been taken out and remains unrevoked.[97] Similar provisions are to be found in some of our States. On the other hand, marriage contracted by a person habitually sane, during temporary insanity, is unquestionably void,[98] as of course would be any marriage contracted by one at the time permanently insane. Strange behavior at, and shortly before and after, the nuptials, at the last stage of the engagement, at the wedding breakfast or reception, on the wedding journey, and so on, are quite material as part of the *res gestæ,* upon the general issue of marriage disqualification at the time of the ceremony. Where, as so often happens, the malady develops soon after, the question is, whether the mind of the contracting party was diseased or not at the time of the contract or ceremony so far as to render that party unfit to contract the marriage. If, as Lord Penzance has ruled, the evidence establishes that it was so diseased, the extent of the derangement is immaterial.[99] And yet so important is it to make the time of consummating this contract the focus of inquiry, that a marriage has been upheld, notwithstanding the husband was, two days after the wedding, adjudged insane under an inquisition of lunacy pending, as his wife knew, at the time of the marriage.[1] Insanity, occurring subsequently to the marriage, is no cause for annulling the marriage, nor, in general, for procuring a divorce;[2] neither would mere evidence of

v. Banker, 63 N. Y. 409; Parker v. Parker, 6 Eng. Ec. 165; Smith v. Smith, 47 Miss. 211.

97. Stat. 15, Geo. II., ch. 30, 1742 (not part of the common law in this country).

98. Legeyt v. O'Brien, Milward, 325; Parker v. Parker, 6 Eng. Ec. 165.

99. Hancock v. Peaty, L. R. 1 P. & D. 335.

1. Banker v. Banker, 63 N. Y. 409. This inquisition declared that the husband had been of unsound mind six months previous to the marriage. But the court of appeals held that such inquisition is only presumptive evidence of incapacity prior to the finding, and rested upon evidence adduced in the action to annul the marriage, which was sufficient to overcome that presumption.

2. See McAdam v. Walker, 1 Dow, 148; Divorce, *post;* Smith v. Smith, 47 Miss. 211.

hereditary taint in the defendant's family suffice for dissolving the conjugal relation.[3]

§ 1104. Marriages, How Annulled for Insanity; Marriages Confirmed.

Suits of nullity, brought to ascertain the facts of insanity, are favored by law both in England and America; and modern legislation discountenances all collateral disputes involving questions so painful and perplexing. "Though marriage with an idiot or lunatic be absolutely void, and no sentence of avoidance be absolutely necessary," says Chancellor Kent, "yet, as well for the sake of the good order of society, as for the peace of mind of all persons concerned, it is expedient that the nullity of the marriage should be ascertained and declared by the decree of a court of competent jurisdiction."[4] In many States this is now the only course to be pursued, such marriages being treated as voidable and not void; and the insane spouse dying before proceedings to dissolve the marriage are begun, the survivor takes all the benefits of a valid marriage accordingly.[5] Such suits of nullity may be brought by a guardian on behalf of the insane spouse, or by the sane spouse who married in good faith, ignorant that the disability existed.[6] Upon reasons of justice and policy, and in conformity with the analogy of fraud, force, and error, to be hereafter noticed, we may presume that one who marries while insane may, by cohabitation and other suitable acts, confirm the marriage, if afterwards restored to reason, so as to dispense with further ceremonies,[7] and that by similar behavior, after knowledge of the disability, the

3. Smith v. Smith, 47 Miss. 211. Cf. Waymire v. Jetmore, 22 Ohio St. 271 (a case of congenital imbecility of mind).

4. 2 Kent Com. 76.

5. 1 Bish. Mar. & Div., 5th ed., §§ 136-142; Goshen v. Richmond, 4 Allen, 458; Hamaker v. Hamaker, 18 Ill. 137; Williamson v. Williams, 3 Jones Eq. 446; Wiser v. Lockwood, 42 Vt. 720; Brown v. Westbrook, 27 Ga. 102; Stuckey v. Mathes, 31 N. Y. Supr. 461.

6. Hancock v. Peaty, L. R. 1 P. & D. 335; Banker v. Banker, 63 N. Y. 409; Crump v. Morgan, 3 Ire. Eq. 91.

7. Cole v. Cole, 5 Sneed, 67; 1 Bish. Mar. & Div., §§ 139-142.

same spouse may become debarred from setting up such insanity on his own behalf. In general, when a couple have lived together as man and wife during their joint lives, it is too late to impugn the marriage afterwards on the ground that the deceased spouse was insane at the time of the nuptials.[8]

§ 1105. Drunkenness.

Upon the principle of temporary insanity, drunkenness incapacitates, if carried to the excess of *delirium tremens;* though not, it would appear, if the party intoxicated retains sufficient reason to know what he is doing.[9] Drunkenness was formerly held a bad plea; for the common law permitted no one to stultify himself; but the modern rule is more reasonable. Some cases require that fraud or unfair advantage should be shown; yet the better opinion is that even this is unnecessary.[10]

The mental capacity requisite to a valid marriage is a capacity to understand the nature of the contract and the duties and responsibilities which it creates.[11] So one may be found incapable of contracting marriage who has for years indulged excessively in intoxicants so as to be helplessly drunk with frequency and to be unable to concentrate his mind upon a subject under discussion, showing little intelligent interest in his own business affairs, being vacillating and uncertain, as well as suspicious, and showing signs of failing memory, where also he had been drinking heavily at the time of the ceremony, which was undertaken suddenly without

8. Sabalot v. Populus, 31 La. Ann. 854.

9. Clement v. Mattison, 3 Rich. 93; 1 Bish. Mar. & Div., 5th ed., § 131; Gore v. Gibson, 13 M. & W. 623; 2 Kent Com. 451, and authorities cited; Lord Ellenborough, in Pitt v. Smith, 3 Camp. 33; Scott v. Paquet, L. R. 1 P. C. 552.

10. See 1 Bish. Mar. & Div., 5th ed., §§ 131, 132, and conflicting cases cited. And see recent Delaware case of Elzey v. Elzey, 1 Houst. 308, under a statute which makes "insanity" a ground of divorce. Steuart v. Robertson, 2 H. L. Sc. 494.

11. Durham v. Durham, L. R. 10 Prob. Div. 80; St. George v. Biddeford, 76 Me. 593; Lewis v. Lewis, 44 Minn. 124, 46 N. W. 323, 9 L. R. A. 505; Kern v. Kern, 51 N. J. Eq. 574, 26 A. 837.

preparation. Such a marriage may be annulled where the plaintiff's mental condition did not improve during the time when he was living with the defendant.[12] Intoxication at the time of marriage renders it voidable and not void.[13]

§ 1106. Deaf and Dumb Persons.

Deaf and dumb persons were formerly classed as idiots; this notion, however, is exploded. They may now contract marriage by signs.[14] Total blindness, or mere deafness, of course constitutes no incapacity.

§ 1107. Whether Marriage of Incompetents Void or Voidable.

The marriage of one mentally incompetent is void[15] and according to the weight of authority where for want of the requisite mental capacity on the part of one of the parties there has been no consent to the marriage contract the purported marriage is an absolute nullity and will be so decreed in any court and in any proceeding where the question may arise, whether during the lifetime of both of the parties or after the death of either of them. In some States, however, statutes have been passed designed to render marriages of this kind free from attack except in proceedings for annulment brought by or on behalf of one of the parties.[16]

12. Dunphy v. Dunphy (Cal.), 119 P. 512, 38 L. R. A. (N. S.) 818.

13. Barber v. People, 203 Ill. 543, 68 N. E. 93.

14. 1 Bish. Mar. & Div., 5th ed., § 123, and cases cited; 1 Fras. Dom. Rel. 48; Dickenson v. Blisset, 1 Dickens, 268; Harrod v. Harrod, 1 Kay & Johns. 4.

15. Medlock v. Merritt, 102 Ga. 212, 29 S. E. 185; Hagenson v. Hagenson, 258 Ill. 197, 101 N. E. 606; *In re* Newlin's Estate, 231 Pa. 312, 80 A. 255; Holland v. Riggs, 53 Tex. Civ. App. 367, 116 S. W. 167. See Bruns v. Cope (Ind.), 105 N. E. 471. See *In re* Hybart, 119 N. C. 359, 25 S. E. 963; *contra*, Wolf v. Gall (Cal. App.), 163 P. 346, 163 P. 350 (voidable only); Watters v. Watters, 168 N. C. 411, 84 S. E. 703 (held voidable).

16. Estate of Gregorson, 160 Cal. 21, 116 P. 60, L. R. A. 1916C, 697.

CHAPTER VI.

PHYSICAL CAPACITY.

SECTION 1108. In General.
1109. Capacity to Copulate the Test.
1110. Extent of Malformation.
1111. Curable Impotency.
1112. Refusal of Intercourse.
1113. Aged Persons.
1114. Epilepsy.
1115. Venereal Disease.
1116. Impotency Arising Subsequent to Marriage.
1117. Void and Not Voidable.
1118. Estoppel to Complain.
1119. Division of Property on Annulment of Marriage of Impotent.

§ 1108. In General.

The question of physical capacity involves an investigation of facts even more painful and humiliating than that of mental capacity. Yet as marriage is instituted, in part at least, for the indulgence of natural cravings and with a view to propagate the human family, sound morality demands that the proper means shall not be wanting. Our law demands that, at all events, the sexual desire may be fully gratified. Where impotence exists, therefore, there can be no valid marriage. By this is meant simply that the sexual organization of both parties shall be complete.[17]

§ 1109. Capacity to Copulate the Test.

But mere barrenness or incapacity of conception constitutes no legal incapacity in England and the United States, nor can a physical defect which does not interfere with copulation.[18]

17. Impotence as cause of divorce, see *post*, § 1109 *et seq.*

18. Anonymous v. Anonymous, 126 N. Y. S. 149, 69 Misc. 489 (hysteria brought on by attempts to consummate is enough); Schroter v. Schroter, 106 N. Y. S. 22, 56 Misc. 69; Wendel v. Wendel, 52 N. Y. S. 72, 30 App. Div. 447 (loss of ovaries by woman); Deane v. Aveling, 1 Robertson, 279, 280.

§ 1110. Extent of Malformation.

The reader will find Dr. Lushington's opinion in the leading case of *Deane* v. *Aveling* sufficiently suggestive as to the extent of malformation which invalidates a marriage on the ground of physical incapacity.[19]

Where there is a certain degree of variation from the normal in the sexual organs of each party and the difficulty in intercourse between them resulted from these variations taken together, where there would have been no difficulty in intercourse between the husband and any other normal woman and the wife and any other normal man, this is impotency justifying divorce.[20]

§ 1111. Curable Impotency.

Impotence will not include indeed any disability which is curable, even though not actually cured, unless the party disabled unreasonably refuses to submit to the proper remedies.[21] A refusal to submit to a slight operation which would cure physical incapacity does not justify annulment, but where a dangerous operation is necessary the incapacity is "incurable."[22] Declining opportunity to be cured may render one's physical defect practically incurable for the purposes of judicial sentence; and, moreover, sexual connection not physically impossible, and yet possible only under conditions to which the healthy spouse ought not to resort, may justify a decree in that spouse's favor.[23] We

19. 1 Robertson, 279, 298. And see case of U—— v. J——, L. R. 1 P. & D. 460; G—— v. G——, L. R. 2 P. & P. & D. 287; H—— v. P——, L. R. 3 P. & D. 126; Payne v. Payne, 46 Minn. 467.

20. S—— v. S——, 192 Mass. 194, — N. E. —.

21. 1 Bish. Mar. & Div., §§ 321-340, and cases cited; 1 Fras. Dom. Rel. 53; B. v. B., 28 E. L. & Eq. 95; 1 Bl. Com. 440, *n.* by Chitty and others; Ayl. Parer. 227; Devenbagh v. Devanbagh, 5 Paige, 554; Essex v. Essex, 2 Howell St. Tr. 736; Briggs v. Morgan, 3 Phillim. 325. For a case where the disability was possibly curable, see G—— v. G——, L. R. 2 P. & D. 287.

22. Anonymous, 158 N. Y. S. 51.

23. Lord Penzance, in G—— v. G——, L. R. 2 P. & D. 287 (the difficulty being on the part of the female. Impotence on the part of the male from previous habits of self-indulgence might present corresponding

may add that, with the rapid progress of medical science during the present century, cases of absolute and incurable impotence are happily diminishing in number.[24]

§ 1112. Refusal of Intercourse.

The refusal of carnal intercourse by a healthy spouse gives rise to inquiries under the head of divorce;[25] while at the same time refusal beyond a reasonable time after marriage may afford a presumption of incapacity, and entitle the offended party to a decree accordingly.[26] Such refusal, however, puts the disabled spouse clearly in the wrong; and where, in an English case, a wife fell into hysterics whenever her husband attempted to have connection with her, and for three years refused to submit to medical inspection, the union was dissolved upon his petition.[27]

§ 1113. Aged Persons.

Annulment cannot be obtained because of the physical incapacity of a person of great age at the time of marriage as one marrying a person of great age cannot expect the usual result of matrimony,[28] although to those who marry past the age of child-bearing, nullity on good grounds of impotence has not been refused.[29]

§ 1114. Epilepsy.

Epilepsy alone may not be enough for annulling a marriage for

considerations). See 1 Bish., §§ 331-338.

24. See T—— v. M——, L. R. 1 P. & D. 31; T—— v. D——, L. R. 1 P. & D. 127; Carll v. Prince, L. R. 1 Ex. 246. But wtih modern facilities, including the right of parties to testify in their own suits, these cases appear to be on the increase in Great Britian.

25. See *post*, §§ 1611, 1636; Cowles v. Cowles, 112 Mass. 298.

26. S—— v. A——, 3 P. D. 72.

27. H—— v. P——, L. R. 3 P. & D. 126. See S—— v. S——, 192 Mass. 194, where the wife was made ill by every attempt at intercourse.

28. Hatch v. Hatch, 110 N. Y. S. 18, 58 Misc. 54.

29. W—— v. H——, 2 Swab. & T. 240.

impotence,[30] but an epileptic may be so mentally incompetent that the marriage should be annulled.[31]

§ 1115. Venereal Disease.

A marriage may be annulled where one of the parties is at the time of its consummation afflicted with a venereal disease concealed from the other.[32] A statute requiring freedom from venereal disease has been construed to mean freedom from acquired and not inherited disease.[33]

§ 1116. Impotency Arising Subsequent to Marriage.

Physical incapacity arising from some cause subsequent to marriage cannot be referred to the present subject; the question being as to incapacity at the date of marriage.[34]

§ 1117. Void and Not Voidable.

The necessity of judicial sentence, before a marriage can be considered null for impotence or physical incapacity, is too obvious for argument.[35] So a marriage entered into in good faith where one of the parties is physically incapable of contracting marriage is voidable and not void[36] *ab initio* and is regarded as valid until

30. Elser v. Elser, 160 N. Y. S. 724 (epilepsy limiting but not preventing copulation is not ground for annulment); McGill v. McGill, 166 N. Y. S. 397, 179 App. Div. 343, 163 N. Y. S. 462, 99 Misc. 86.

31. Kitzam v. Kitzam, 167 Wis. 308, 166 N. W. 789.

32. Smith v. Smith, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. Rep. 440 (where no cohabitation occurred); Jordan v. Missouri & Kansas Telephone Co., 136 Mo. App. 192 116 S. W. 432; Svenson v. Svenson, 178 N. Y. 54, 70 N. E. 120, 79 N. Y. S. 657, 78 App. Div. 536; Anonymous, 49 N. Y. S. 331, 21 Misc. 765; C—— v. C——, 158 Wis. 301, 148 N. W. 865; *contra*, Vondal v. Vondal, 175 Mass. 383, 56 N. E. 586, 78 Am. St. R. 502 (where disease not contagious).

33. Peterson v. Widule, 157 Wis. 641, 147 N. W. 966, 52 L. R. A. (N. S.) 778. See further *post*, § —.

34. See Morrell v. Morrell, 24 N. Y. Supr. 324. As cause of divorce, see *post*, § 1549.

35. A—— v. B——, L. R. 1 P. & D. 559. See further *post*, § —.

36. Bennett v. Bennett, 169 Ala. 618, 53 So. 986; Coats v. Coats, 160 Cal. 671, 118 P. 441, 36 L. R. A. (N. S.) 844.

regularly dissolved. Therefore under a statute allowing a minor wife to sue in her own name she can do so although after reaching her majority her marriage was annulled on the ground of her malformation.[37-38] But the decree has gone so far as to render the marriage void *ab initio;* there being at all events no prosperity to be injuriously affected by so sweeping a sentence, nor much love lost between the conjugal pair whose union comes to so humiliating an end. Jurisdiction is exercised to declare the marriage originally void.

It is held in some of the United States that, in the absence of any express statutory provision therefor, a marriage will not be annulled for impotence.[39]

§ 1118. Estoppel to Complain.

Suits for impotence ought to be brought within a reasonable time after marriage, as otherwise a waiver of the disqualification may be presumed.[40] So a husband who lives with his wife for some years during which she has borne children is estopped to bring action to annul the marriage on account of the wife's incapacity at the time of the marriage.[41]

§ 1119. Division of Property on Annulment of Marriage of Impotent.

Where a marriage is annulled on account of the physical incapacity of the wife the property accumulated during their marriage by their joint efforts should be divided and the wife given what seems to the court just in view of all the circumstances.

37-38. Bennett v. Bennett, 169 Ala. 618, 53 So. 986, L. R. A. 1916C, 693.

39. Anonymous, 24 N. J. Eq. 19.

40. In Peipho v. Peipho, 88 Ill. 438, eight years was held too long a delay. In W—— v. R——, 1 P. & D. 405, a suit for impotence was refused, where delayed twenty-five years and then brought as the result of a domestic quarrel. Some statutes, as, for instance, that of New York, provide a barrier by special limitation; which limitation, *semble*, should be pleaded in defence. Kaiser v. Kaiser, 23 N. Y. Supr. 602.

41. Watters v. Watters, 168 N. C. 411, 84 S. E. 703.

Even though strictly speaking there is no "community property" where there has not been a valid marriage, the courts may well, in dividing gains made by the joint efforts of a man and woman living together under a voidable marriage which is subsequently annulled, apply, by analogy, the rules which would obtain with regard to community property. The apportionment of such property between the parties, when not provided by any statute, must be made on equitable principles, and in the absence of special circumstances, such as might arise through intervening claims of third persons, there should be an equal division.[42]

42. Coats v. Coats, 160 Cal. 671, 18 P. 441, 36 L. R. A. (N. S.) 844 (where the man was farming and in other business and the wife acted as housekeeper, for most of the period although during the latter part of the time her services had no monetary value).

CHAPTER VII.

INFANCY.

SECTION 1120. Disqualification of Infancy.
1121. Minors Over Age of Consent May Marry.
1122. Age of Consent.
1123. Whether Void or Voidable.
1124. Fraud on Infant.
1125. Election to Affirm or Disaffirm.

§ 1120. Disqualification of Infancy.

Infancy may be an impediment to marriage; but only so far, on principle, as the marrying party, by reason of imperfect mental and physical development, may be brought within the reason of the last two rules. Hence we find that infancy is not a bar to marriage to the same extent as in ordinary contracts; since minors cannot repudiate their choice of husband or wife on reaching majority. Not that marriage calls for less discrimination, for it carries with it consequences far beyond all other contracts, involving property rights of the gravest import; but because public policy must protect the marriage institution against the reckless imprudence of individuals.

§ 1121. Minors Over Age of Consent May Marry.

Marriages of infants over the age of consent are as binding as those of adults; marriages within such age may be avoided by either party on reaching the period fixed by law. And even though one of the parties was of suitable age and the other too young, at the time of marriage, yet the former, it appears, may disaffirm as well as the latter.[43]

43. Co. Litt. 79, and Harg. *n.* 45; 1 East P. C. 468. But it is not certain that a party of competent age may disaffirm equally with the party incompetent. People v. Slack, 15 Mich. 193.

§ 1122. Age of Consent.

A certain period is established, called the age of consent, which in England is fixed at fourteen for males and twelve for females, a rule adopted from the Roman law, but which, in this country, varies all the way from fourteen to eighteen for males, and twelve to sixteen for females, according to local statutes; differences of climate and physical temperament contributing, doubtless, to make the rule of nature, in this respect, a fluctuating one.[44]

At common law a female of the age of twelve and a male of the age of fourteen were capable of entering into a contract of marriage,[45] and in the absence of statute the common-law rule governs,[46] but other rules may be laid down by law.[47]

A statute providing at what ages marriage may be entered into will not change the common-law rule,[48] and statutes prohibiting a marriage under an age specified, in the absence of an express declaration that it should be void, are commonly held directory merely, and the contract not void but voidable.[49]

Marriages may in general be made between minors of sufficient age to enable them to contract when properly solemnized.[50]

44. See 2 Kent Com. 79, notes, showing the periods fixed in different States as the age of consent. In the old States the common-law rule generally prevails. In Ohio, Indiana, and other Western States, the age of consent is raised to eighteen for males, and fourteen for females. See also Bennett v. Smith, 21 Barb. 439, as to the power of the New York courts to annul marriages with persons under age. A learned treatise on the age of consent in ancient and modern times will be found in 30 Harvard Law Review, 124.

45. State v. Bittick, 103 Mo. 183, 15 S. W. 325, 11 L. R. A. 587, 23 Am. St. R. 869.

46. Green v. Green (Fla.), 80 So. 739; Browning v. Browning, 89 Kan. 98, 130 P. 852.

47. White v. Hill, 176 Ala. 480, 58 So. 444; Morgan v. Morgan (Ga.), 97 S. E. 675; Crapps v. Smith, 9 Ga. App. 400, 71 S. E. 501; Develin v. Riggsbee, 4 Ind. 464.

48. Cushman v. Cushman, 80 Wash. 615, 142 P. 26; *contra*, Matthes v. Matthes, 198 Ill. App. 515 (statute fixing marriage age raises age of consent).

49. Titsworth v. Titsworth, 78 N. J. Eq. 47, 78 Atl. 687.

50. Reifschneider v. Reifschneider, 144 Ill. App. 119, 241 Ill. 92, 89 N. E. 255; Greenberg v. Greenberg, 160 N. Y. S. 1026, 97 Misc. 153.

There can be no common-law marriage by one under the age of consent fixed by statute,[51] and a marriage by one below the age of consent with the consent of the parent may be valid.[52]

§ 1123. Whether Void or Voidable.

A marriage of one under age is voidable only, and may be affirmed or disaffirmed on reaching majority,[53] unless the person was under seven years of age, when it is absolutely null.[54] Marriage within the age of consent seems therefore to be neither strictly void nor strictly voidable, but rather inchoate and imperfect;[55] Where one of the parties is under the age fixed by the statute, but is competent by the common law, the marriage is not void but merely voidable, and is valid until annulled.[56]

§ 1124. Fraud on Infant.[57]

The marriage of an adult with a minor may involve consider-

51. Hardy v. State, 37 Tex. Cr. R. 55, 38 S. W. 615.

52. People v. Souleotes, 26 Cal. App. 309, 146 P. 903.

53. Owen v. Coffey (Ala.), 78 So. 885; Americus Gas & Electric Co. v. Coleman, 84 S. E. 493; Canale v. People, 177 Ill. 219, 52 N. E. 310; People v. Ham, 206 Ill. App. 543 (under age of consent); Levy v. Downing, 213 Mass. 334, 100 N. E. 638; State v. Lowell, 78 Minn. 166, 80 N. W. 877, 46 L. R. A. 440, 79 Am. St. R. 358; Territory v. Harwood, 15 N. M. 424, 110 P. 556; Wood v. Baker, 88 N. Y. S. 854, 43 Misc. 310; Mitchell v. Mitchell, 117 N. Y. S. 671, 63 Misc. 580; Hunt v. Hunt, 23 Okla. 490, 100 P. 541; Jordan v. Manning, 2 Tenn. C. C. A. 130; *Ex parte* Hollopeter, 52 Wash. 41, 100 P. 159 (where parties are of common-law age of consent); Glenn v. Hollopeter, *Id.*

54. Jordan v. Manning, 2 Tenn. C. C. A. 130; 2 Burn Ec. Law, 434; 1 Bish. Mar. & Div., § 147.

55. Co. Litt. 33*a*; 2 Kent Com. 78, 79; 1 Bish. Mar. & Div., 5th ed., §§ 143-153, and cases cited; 1 Bl. Com. 436; 1 Fras. Dom. Rel. 42; Parton v. Hervey, 1 Gray, 119; Fitzpatrick v. Fitzpatrick, 6 Nev. 63. See Shafher v. State, 20 Ohio, 1; *contra*, Goodwin v. Thompson, 2 Iowa, 329; Aymar v. Roff, 3 Johns. Ch. 49, as to the invalidity of such marriages, unless confirmed by cohabitation after reaching the statutory age. Local statutes affect this whole subject.

56. Willits v. Willits, 76 Neb. 28, 107 N. W. 379, 5 L. R. A. 767; Bays v. Bays, 174 N. Y. S. 212.

57. As to fraud, see further *post*, § 1137 *et seq.*

ations of fraud and undue influence. In an Illinois case, a bill was brought on behalf of an infant to annul a marriage and declare the contract void. It appeared that the complainant was, at the time of the marriage, a school girl, about fifteen years old;[58] that the defendant, her father's coachman, while driving the children out, inveigled the complainant into the marriage; that he procured a marriage license through perjury, by swearing that the complainant was of age; and that she never consummated the marriage by cohabitation, but immediately repudiated it. The incongruity of such a match, the youth of the girl, the palpable abuse by a hired adult servant of the confidence reposed in him by the child's parents, and the minor's repudiation of the marriage before the nuptials had been consummated, were circumstances influential with the court. The case being a peculiar one, upon these facts rather than on principle, decree was entered, justly enough, declaring void the marriage.[59]

Where, too, an infant under the age of assent, immediately after the ceremony with an adult, and before its consummation, has alleged ignorance and a dissent, a court of chancery has in New York interposed its protection and prohibited the adult from all intercourse and correspondence.[60-61]

§ 1125. Election to Affirm or Disaffirm.

Marriages celebrated before both parties have reached the age of consent may be disaffirmed in season, either with or without a

58. The context shows that the girl was of an age where the consent of parents was required by statute, not, however, as an essential. She had progressed slightly beyond that period when infancy is a genuine impediment; so that the case was perhaps without precedent, and Walker, J., dissented from the judgment because of her legally sufficient age.

59. Lyndon v. Lyndon, 69 Ill. 43; Walker, J., dis. It was here intimated that had the parties lived voluntarily together as man and wife, the girl knowing of the perjury, the marriage would have been valid. Harford v. Morris, 2 Hag. Con. 423; Robertson v. Cole, 12 Tex. 356.

60-61. Aymar v. Roff, 3 Johns. Ch. 49. As to consent of parents and guardians see *post*, § 1207 *et seq.*

judicial sentence. When the age of consent is reached, no new ceremony is requisite to complete the marriage at the common law; but election to affirm will then be inferred from circumstances, such as continued intercourse, and even slight acts may suffice to show the intention of the parties. If they then choose to remain husband and wife, they are bound forever. Disaffirmance, on the other hand, may be either with or without a judicial sentence. So the infant on attaining age has a right to elect to affirm or disaffirm a marriage made while under age, but after making her election cannot change her decision.[62] An action to annul a marriage may be brought on the ground of being under age.[63]

62. Terrky v. Terrky, 160 N. Y. S. 1016, 96 Misc. 594.

63. Johnson v. Alexander (Cal. App.), 178 P. 297; Matthes v. Matthes, 198 Ill. App. 515; Henneger v. Lomas, 145 Ind. 287, 44 N. E. 462, 32 L. R. A. 848 (being under 16); Melcher v. Melcher (Neb.), 169 N. W. 720; Taub v. Taub, 87 N. J. Eq. 624, 101 A. 246; Silveira v. Silveira, 69 N. Y. S. 634, 34 Misc. 267; Pettit v. Pettit, 93 N. Y. S. 1001, 105 App. Div. 312, 16 N. Y. Ann. Cas. 307; Wander v. Wander, 97 N. Y. S. 586, 111 App. Div. 189; Mundell v. Coster, 142 N. Y. S. 142, 80 Misc. 337; Kruger v. Kruger, 119 N. Y. S. 189, 64 Misc. 382, judg. rev. (1910) 122 N. Y. S. 23, 137 App. Div. 289; Macri v. Macri, 164 N. Y. S. 112, 177 App. Div. 292; Bays v. Bays, 174 N. Y. S. 212. See Browning v. Browning, 89 Kan. 98, 130 P. 852 (fact that marriage of minor took place without a license and without the consent of parent or guardian is not enough). See Allerton v. Allerton, 172 N. Y. S. 152. See Padula v. Padula, 160 N. Y. S. 833, 96 Misc. 597 (marriage celebrated out of the State).

CHAPTER VIII.

PRIOR MARRIAGE UNDISSOLVED.

SECTION 1126. Bigamous Marriage Void.
1127. Bigamy a Crime.
1128. Effect of Belief in Death of Absent Spouse.
1129. Bigamous Relations Continuing After Removal of Impediment.
1130. Effect of Bigamous Marriage on Innocent Party.
1131. Annulment on Petition of the Innocent Party.
1132. Estoppel.
1133. Termination of Prior Marriage as Defence to Action for Annulment.

§ 1126. Bigamous Marriage Void.

Polygamy, or bigamy as it is often termed — since the common law of England could scarcely conceive of such conjunctions carried beyond a double marriage — is discarded by all Christian communities. The fundamental doctrine of Christian marriage is that no length of separation can dissolve the union, so long as both parties are actually living, even though lapse of time should raise a reasonable supposition of death. But to render the second marriage void at law, the first should have been valid in all respects.[64]

At common law, if either party to a marriage has a husband or wife living at the time of marriage the marriage is absolutely void,[65]

64. Bruce v. Burke, 2 Add. Ec. 471; 2 Eng. Ec. 381; Reg. v. Chadwick, 12 Jur. 174; Patterson v. Gaines, 6 How. (U. S.) 550.

65. Goeset v. Goeset, 112 Ark. 47, 164 S. W. 759; Duenser v. Supreme Council of Royal Arcanum, 262 Ill. 475, 104 N. E. 801 (rev. judg., 178 Ill. App. 648); Tefft v. Tefft, 35 Ind. 44; Steele v. Steele, 13 Ky. Law Rep. 45; Succession of Thomas (La.), 80 So. 186; Clark v. Clark, 115 Miss. 726, 76 So. 638; *In re* Huston's Estate, 48 Mont. 524, 139 P. 458; McCullen v. McCullen, 147 N. Y. S. 1069, 162 App. Div. 599; Barker v. Barker, 158 N. Y. S. 413, 172 App. Div. 244, 156 N. Y. S. 194, 92 Misc. 390; Butler v. Butler, 157 N. Y. S. 188, 93 Misc. 258; Oklahoma Land Co. v. Thomas, 34 Okla. 681, 127 P. 8 (under Indian law); Lee v. Bolden (Tex.

ab initio,[66] and this rule applies to a marriage without ceremony as to one with ceremony,[67] and the one who remarries continues as the spouse of the first marriage notwithstanding the subsequent bigamous marriage.[68]

A marriage ceremony properly performed does not disturb the polygamous relation of one already married to two women.[69]

§ 1127. Bigamy a Crime.

It is a well established rule in civilized countries that marriage between parties, one of whom is bound by an existing marriage tie, is not only void, but subjects the offenders to criminal prosecution.[70] Polygamy remains an indictable offence. One of its less obvious evils — though not the least important when polygamy is regarded as a legalized institution in a free country — is that the patriarchal principle which it introduces is thoroughly hostile to free institutions; this fact was pointed out many years ago by one of our best writers on political ethics.[71]

In application of these broad principles, the welfare of the community has been regarded, and likewise the injury inflicted by a polygamous and void marriage upon the innocent party who is made the victim of deception. Prosecutions for bigamy have been sustained against a prisoner whose second marriage was within the prohibited degrees of affinity, or one who, unknown to his partner, assumes a false name in avoidance of proper cere-

Civ. App. 1905), 85 S. W. 1027; Grigsby v. Reib (Tex. Civ. App. 1911), 139 S. W. 1027; *In re* Geith's Estate, 129 Wis. 498, 109 N. W. 552; Zahorka v. Geith, *Id.*

66. McCaig v. State (Ala. App.), 80 So. 155; Curlew v. Jones (Ga.), 91 S. E. 115; Dye v. Dye, 125 N. Y. S. 242, 140 App. Div. 309.

67. People v. Seaman, 107 Mich. 348, 65 N. W. 203, 61 Am. St. R. 326; Walton v. Walton (Tex. Civ. App.), 191 S. W. 188; Cunningham v. Cunningham (Tex. Civ. App.), 210 S. W. 242.

68. Estes v. Merrill, 121 Ark. 361, 181 S. W. 136.

69. Riddle v. Riddle, 26 Utah, 268, 72 P. 1081.

70. Cro. Eliz. 858; 1 Salk. 121; 2 Kent Com. 79, and notes; 1 Bish. Mar. & Div., §§ 296-303, and authorities cited; Shelf. Mar. & Div. 224; Hyde v. Hyde, L. R. 1 P. & D. 130.

71. 2 Lieber Pol. Ethics, 9, cited in note to 2 Kent Com. 81.

monials.[72] In such indictments the rule that a marriage solemnized by a priest, under which the parties have cohabited as husband and wife, is *prima facie* a marriage everywhere, will apply.[73]

§ 1128. Effect of Belief in Death of Absent Spouse.

Nor is a new marriage entered into by one spouse in good faith, and in full but erroneous belief that the other spouse is dead, valid even after the lapse of the statutory absence; such parties are not free to marry again, but only relieved of the worst consequences,[74] although one party honestly believes the other to be free to marry.[75] Some of the harsher features of the old law have been softened in our own legislation; and statutes are not uncommon which possibly extend facilities for divorce from the old relation, and in any event protect the offspring of a new marriage contracted erroneously, but in good faith, by parties who had reason to believe a former spouse dead.[76] So, too, polygamy in fact is relieved of its penal consequences as concerns parties not

72. Queen v. Allen, L. R. 1 C. C. 367; Queen v. Rea, L. R. 1 C. C. 365. See also "Bigamy," in Bishop or Wharton on Criminal Law.

73. Commonwealth v. Kenney, 120 Mass. 387; Taylor v. State, 52 Miss. 84. And see Blossom v. Barrett, 37 N. Y. 434, for circumstances under which the woman fraudulently induced to enter into a void marriage of this sort may sue the man in damages.

74. Glass v. Glass, 114 Mass. 563, and cases cited; Williamson v. Parisien, 1 Johns. Ch. 389; Miles v. Chilton, 1 Robertson, 684; Spicer v. Spicer, 16 Abb. Pr. (N. S.) 112; 1 Bish. Mar. & Div., § 299. Such marriage, under Massachusetts statutes, may be annulled by a sentence containing (in order to make children begotten before the commencement of the suit legitimate) the statement that it was contracted in good faith and with the full belief of the parties that the absent spouse was dead. Glass v. Glass, *supra*. Lawful competence to marry again results, however, under some local statutes, from such absence. Strode v. Strode, 3 Bush, 227.

75. Evatt v. Mier, 169 S. W. 817; Middleton v. Johnston (Tex. Civ. App. 1908), 110 S. W. 789.

A marriage contracted by the wife while her husband is absent, and she in good faith believes him dead, is void and not merely voidable. Goset v. Goset, 112 Ark. 47, 164 S. W. 759, L. R. A. 1916C, 707.

76. See N. Y. Rev. Stat., Vol. 2, p. 139, §§ 6, 7; Mass. Gen. Sts., ch. 107, §§ 4, 30.

guilty of polygamy in intention; but a certain period must elapse — usually seven years — before death can be presumed from one's mere continuous absence without being heard from. Such was one of the provisions in the English statute passed to make bigamy a civil offence, in the reign of James I,[77] which also exempted from punishment for bigamy persons re-married during the life-time of the former spouse after a divorce, sentence of nullity, or disaffirmance on reaching age of consent. Similar statutes for the punishment of bigamy, with similar reservations, are enacted in this country; but in England and the United States some defects of the original legislation are now cured, and divorce from bed and board would not exempt an offender from prosecution.[78]

The presumption of a legal marriage prevails after absence of the former spouse unheard of for the statutory period, although he had been absent unheard of for less than the statutory period at the time of the marriage, as the presumption of death from absence does not raise a presumption of death at any particular time.[79]

A statute providing that the death of an absent spouse shall be presumed in case of his absence from the State unheard of for five years does not apply in a case where the husband was within the State during that time although the wife did not know of it.[80]

§ 1129. Bigamous Relations Continuing After Removal of Impediment.

Where a marriage entered into in good faith by one is void on account of a previous marriage of one of the parties, it may be

77. Stat. 1 Jac. I., ch. 11, 1604. See Queen v. Lumley, L. R. 1 C. C. 196; Queen v. Curgerwen, L. R. 1 C. C. 1.

78. Reeves v. Reeves, 54 Ill. 332; Drummond v. Irish, 52 Ia. 41. Still further, see 2 Kent Com. 79, and notes. See also Stats. 9 Geo. IV., ch. 31; 24 & 25 Vict., ch. 100. Legitimating statutes are to be found in numerous States on behalf of the offspring of innocent marriages of this kind. See cases *infra*, § 1129.

79. Cash v. Cash, 67 Ark. 278, 55 S. W. 744; Stein v. Stein, 66 Ill. App. 526; Smith v. Fuller, 138 Ia. 91, 115 N. W. 912; Howard v. Kelly, 111 Miss. 285, 71 So. 391.

80. Goset v. Goset, 112 Ark. 47, 164 S. W. 759, L. R. A. 1916C, 707.

validated by the removal of the impediment and the continued cohabitation of the parties,[81] and statutes have been passed in many States validating marriages made where the parties live together after the removal of an impediment,[82] but these statutes

81. Poole v. People, 24 Colo. 510, 52 P. 1025, 65 Am. St. R. 245; Smith v. Reed, 145 Ga. 724, 89 S. E. 815, L. R. A. 1917A, 492; Land v. Land, 206 Ill. 288, 68 N. E. 1109, 99 Am. St. R. 171; Manning v. Spurck, 199 Ill. 447, 65 N. E. 342; Haywood v. Nichols, 99 Kan. 138, 160 P. 982; Jones v. Squire, 137 La. 883, 69 So. 733; Busch v. Supreme Tent of Knights of Maccabees of the World, 81 Mo. App. 562; Eaton v. Eaton, 66 Neb. 676, 92 N. W. 995, 60 L. R. A. 605; Chamberlain v. Chamberlain, 68 N. J. Eq. 736, 62 A. 680, 111 Am. St. R. 658, 68 N. Y. Eq. 414, 59 A. 813; G—— v. G——, 67 N. J. Eq. 30, 56 A. 736; 108 N. Y. S. 164, 123 App. Div. 79, affirmed; *In re* Wells' Estate, 194 N. Y. 548, 87 N. E. 1129; Wilson v. Burnett, 172 N. Y. S. 673.

At common law, the remarriage of a person having a husband or wife actually living, although unheard of for years and believed to be dead, was void from the beginning. *In re* Kutter's Estate, 139 N. Y. S. 693, 79 Misc. 74; Geiger v. Ryan, 108 N. Y. S. 13, 123 App. Div. 722; *In re* Schmidt, 87 N. Y. S. 428, 42 Misc. 463, 15 N. Y. Ann. Cas. 1; Taylor v. Taylor, 55 N. Y. S. 1052, 28 Civ. Proc. R. 323, 25 Misc. 566; *In re* Beegle's Estate, 64 Pa. Super. Ct. 180; Davis v. Whitlock, 90 S. C. 233, 73 S. E. 171.

Contra, Pettit v. Pettit, 93 N. Y. S. 1001, 105 App. Div. 312, 16 N. Y. Ann. Cas. 307; Edelstein v. Brown, 35 Tex. Civ. App. 625, 80 S. W. 1027; Riddle v. Riddle, 26 Utah, 268, 72 P. 1081 (where man had three wives); Severa v. National Slavonic Society of the United States, 138 Wis. 144, 119 N. W. 814 (prohibition against remarriage of divorced person). See Barkley v. Dumke, 99 Tex. 150, 87 S. W. 1147. See Hall v. Industrial Commission, 165 Wis. 364, L. R. A. 1917D, 829, 162 N. W. 312 (new contract of marriage necessary — mere cohabitation as husband and wife is not enough).

82. Carney v. Chapman, 247 U. S. 102, 38 S. Ct. 449, 62 L. Ed. 1005, 158 P. 1125 (Indian marriages); Lufkin v. Lufkin, 182 Mass. 476, 65 N. S. 840; s. c., 192 U. S. 601, 24 Sup. Ct. 849, 48 L. Ed. 583; Gardner v. Gardner (Mass.), 122 N. E. 308 ("good faith" has no technical meaning, but depends on the intellectual capacity of the parties); Commonwealth v. Josselyn, 186 Mass. 186, 71 N. E. 313 Crickett v. Hardin (Okla.), 159 P. 275 (Indian marriages); Roberson v. McCauley, 61 S. C. 411, 39 S. E. 570 (statute does not apply to concubinage); Francis v. Francis, 31 Grat. (Va.) 283. See Commonwealth v. Stevens, 196 Mass. 280, 82 N. E. 33 (statute does not validate marriage made out of State. See Hilliard v. Baldwin, 76 N. H. 142, 80 A. 139.

do not apply to illicit cohabitation nor make marriage contracts not intended by the parties.[83] So statutes have been passed in many States designed to protect marriage entered into in good faith after the absence unheard of of the former spouse for a certain time,[84] but such acts do not protect the spouse who deserts the other in remarrying after the lapse of time during the life of the deserted spouse,[85] and where the second marriage takes place before the expiration of the statutory period it is invalid from the beginning.[86]

Where a man married during the life of his wife undivorced, and the woman did not know of the existence of the first wife, and they lived together as man and wife until after the death of the first wife, the second wife thereupon became the legal wife and a child born after that time became legitimate. If a man and wife begin to cohabit not as man and wife, but as a meretricious cohabitation, their continued cohabitation will be presumed to continue on the same basis unless something is shown to the contrary.

83. Bell v. Bell, 196 Ala. 465, 71 So. 465.

84. *In re* Harrington's Estate, 140 Cal. 244, 73 P. 1000, 98 Am. St. R. 51; Harrington v. Union Trust Co., 140 Cal. 294, 74 P. 136; Price v. Price, 33 Hun, 76; Taylor v. Taylor, 169 N. Y. 601, 173 N. Y. 266, 62 N. E. 1101, 65 N. E. 1098, 71 N. Y. S. 411, 63 App. Div. 231; *In re* Spondre, 162 N. Y. S. 943, 98 Misc. 524; Circus v. Independent Order Ahawas Israel, 67 N. Y. S. 342, 55 App. Div. 534; Chittenden v. Chittenden, 123 N. Y. S. 629, 68 Misc. 172; *In re* Del Genovese's Will, 120 N. Y. S. 1121, 136 App. Div. 894; Stokes v. Stokes, 113 N. Y. S. 142, 128 App. Div. 838.

Where the husband is sent to prison for the statutory period this does not raise a presumption at the end of the period that he is dead. Alixanian v. Alixanian, 59 N. Y. S. 1068, 28 Misc. 638.

Where the constitution prohibits divorces the act validating the marriage of one after the absence of the spouse for seven years unheard of is void as marriages are indissoluble, although a presumption of death may be invoked to uphold the second marriage. Davis v. Whitlock, 90 S. C. 233, 73 S. E. 171. See, however, Gargan v. Sculley, 144 N. Y. S. 205, 82 Misc. 667. See Oram v. Oram, 3 Redf. Sur. 300.

85. *In re* Richards' Estate, 133 Cal. 524, 65 P. 1034; Snuffer v. Karr, 197 Mo. 182, 94 S. W. 983.

86. *In re* Stanton, 123 N. Y. S. 458.

But where a man and woman enter into a ceremonial marriage, thus openly declaring their intention to be husband and wife, and live together, the marriage may be void because of some impediment and the cohabitation may not be legal; but if the impediment is removed, and the matrimonial cohabitation continues, it is to be presumed that the intent to be husband and wife expressed in the ceremonial marriage continues unless the contrary appears, and the continued cohabitation after the removal of the impediment is to be considered as under such an intent and declaration rather than with an unlawful intent. At least a renewed consent might be inferred.[87]

§ 1130. Effect of Bigamous Marriage on Innocent Party.

A marriage with one whose spouse is still living being void, the innocent party who was misled into that bigamous match is under no disability, in consequence, from marrying again; and hence, though the bigamous husband still lives, the second woman he took is free to accept another.[88]

Where one of the parties to a marriage is already married, and the other party afterwards marries a third person, the latter cannot obtain a decree nullifying such latter marriage, since the first marriage was void.[89] Until the fact that the first spouse is alive becomes known the relation between the parties to the second marriage is not unlawful, but is a status conferring rights recognized by law,[90] but not where the existence of the first marriage was known to both parties to the second marriage,[91] and not where

87. Smith v. Reed, 145 Ga. 724, 89 S. E. 815, L. R. A. 1917A, 492.

88. Reeves v. Reeves, 54 Ill. 332; Drummond v. Irish, 52 Ia. 41.

Certainly if deceived in the bigamous marriage. Patterson v. Gaines, 6 How. U. S. 550. And even if not deceived. Martin v. Martin, 22 Ala. 86.

89. Klaas v. Klaas, 14 Pa. Super. Ct. 550.

90. Grand Lodge Knights of Pythias v. Barnard, 9 Ga. App. 71, 70 S. E. 678.

91. Clark v. Barney, 24 Okla. 455, 103 P. 598.

the parties did not use ordinary diligence in ascertaining that the first marriage had terminated.[92]

§ 1131. Annulment on Petition of the Innocent Party.

Where the court interposes to declare the bigamous marriage void, as prudence requires, or perhaps some statute mitigating the consequences, it insists upon the innocence of the person asking relief,[93] and one who innocently contracts marriage with one already married at the time can have the marriage annulled.[94]

§ 1132. Estoppel.

An estoppel may be created where the parties live together after discovering that the marriage is void.[95]

§ 1133. Termination of Prior Marriage as Defence to Action for Annulment.

Where the pre-existing marriage is terminated before the action

92. *In re* Biersack, 159 N. Y. S. 519, 96 Misc. 161; Walker v. Walker's Estate (Tex. Civ. App. 1911), 136 S. W. 1145 (where first husband's divorce suit was dismissed and wife relied on his statement that he had been granted a divorce).

93. Tefft v. Tefft, 35 Ind. 44; 1 Bish., § 300.

94. Tefft v. Tefft, 35 Ind. 44; Batty v. Greene, 206 Mass. 561, 92 N. E. 715 (annulment during lifetime of parties); Vigno v. Vigno (N. H.), 106 A. 285; Freda v. Bergman, 77 N. J. Eq. 46, 76 A. 460 (though plaintiff negligent in relying on statements of the other); Barker v. Barker, 158 N. Y. S. 413, 172 App. Div. 244, 156 N. Y. S. 194, 92 Misc. 390; Hall v. Hall, 123 N. Y. S. 1056, 139 App. Div. 120; 122 N. Y. S. 401; 67 Misc. 267 (plaintiff has burden of showing that prior divorce is void); 113 N. Y. S. 142, 128 App. Div. 838, reversed; Stokes v. Stokes, 198 N. Y. 301, 91 N. E. 793; Brown v. Brown, 138 N. Y. S. 602, 153 App. Div. 645 (although plaintiff knew of existing marriage); McCarron v. McCarron, 56 N. Y. S. 745, 26 Misc. 158; Buckley v. Buckley, 50 Wash. 213, 96 P. 1079. See Wilcox v. Wilcox, 171 Cal. 770, 155 P. 95. See Michels v. Fennell, 15 N. D. 188, 107 N. W. 53 (this is not an action for fraud under the statute). See Johannessen v. Johannessen, 128 N. Y. S. 892, 70 Misc. 361.

95. Stokes v. Stokes, 113 N. Y. S. 142, 128 App. Div. 838; French v. French, 131 N. Y. S. 1053, 74 Misc. 626.

for annulment is brought the second marriage will not be annulled.[96]

96. Donnelly v. Strong, 175 Mass. 157, 55 N. E. 892; Turner v. Turner, 189 Mass. 373, 75 N. E. 612, 109 Am. St. R. 643.

Marriage under duress. A former marriage, which has been decreed to have been void because induced by duress, was void *ab initio*, and hence does not afford ground for annulment of a later marriage between one of the parties and a third person, though such decree was rendered after the second marriage. Taylor v. White, 160 N. C. 38, 75 S. E. 941; Taylor v. Taylor, 71 N. Y. S. 411, 63 App. Div. 231, 169 N. Y. 601, 173 N. Y. 266, 62 N. E. 1101, 65 N. E. 1098; Hervey v. Harvey, 92 N. Y. S. 218.

CHAPTER IX.

EFFECT OF PRIOR DIVORCE.

SECTION 1134. Effect of Divorce.
1135. Prohibition on Remarriage After Divorce.
1136. Void or Voidable.

§ 1134. Effect of Divorce.

A decree of divorce renders the party free to marry again,[97] but not where the second marriage takes place after the interlocutory decree and before the final decree,[98] or where the divorce decree was void for want of jurisdiction over the parties.[99] And a sham divorce, wrongfully procured and null, affords neither justification for a new marriage, nor defence to an indictment for bigamy.[1]

The fact that one honestly but erroneously believed that she was legally divorced does not render the second marriage valid.[2]

§ 1135. Prohibition on Remarriage After Divorce.[3]

Under this same head may be considered a disqualification introduced into some parts of this country by legislative enactments; namely, the impediment which follows divorce. A divorce *a vinculo* should on general principles leave both parties free to marry again. But such is not always the case. Thus in Kentucky the person injured may not marry again before the expiration of two years from the decree of dissolution.[5] And in several States the guilty party is prohibited from marrying again during

97. People v. Booth, 121 Mich. 131, 79 N. W. 1100, 6 Det. Leg. N. 415 (though not formally filed till later).

98. Commonwealth v. Stevens, 196 Mass. 280, 82 N. E. 33; Wilson v. Burnett, 172 N. Y. S. 673; Dallman v. Dallman, 159 Wis. 480, 149 N. W. 137.

99. State v. Westmoreland, 76 S. C. 145, 56 S. E. 673, 8 L. R. A. (N. S.) 842.

1. People v. Dawell, 25 Mich. 247.

2. Wilson v. Allen, 108 Ga. 275, 33 S. E. 975.

3. See, further, *post*, § 1917 *et seq.*

5. Cox v. Combs, 8 B. Monr. 231.

the lifetime of the innocent spouse divorced — a provision of law seemingly more judicious to apply *in terrorem* by way of prevention than as a suitable method of punishment.[6] In Scotland there is a peculiar, but not unreasonable, law which forbids the guilty party after divorce from marrying the *particeps criminis;* this was framed evidently to defeat collusive practices between persons desiring to put away an outstanding obstacle to their own union.[7]

Rules applicable to this special topic may be better understood when we come to investigate the law of divorce. The statutes themselves, however, have received very little authoritative exposition. Some of them, while providing for a grant of leave by the court to marry again, are enabling and not restrictive in character, and hence do not bind persons who are at liberty to marry without the judicial sanction.[8] On the other hand, where one party in a case of divorce, being under the impediment of the statute, and within proper jurisdiction, marries again during the life of the other party, the new marriage is null; and if, after the impediment is removed by statutory lapse of time, leave of court to marry again, or the death of such other party, they who have thus erred enter into no new contract or ceremony of marriage, but continue cohabiting on the faith of the null marriage, their belief that it was legal will not render it so or shield them from the consequences.[9]

§ 1136. Void or Voidable.

Where one forbidden to remarry by a divorce decree for a certain period does remarry within the period the marriage is void, and cohabitation of the parties after expiration of the period is not effective to validate the marriage.[10]

6. See Parke v. Barron, 20 Ga. 702; Clark v. Cassidy, 62 Ga. 407; Kinnier v. Kinnier, 53 Barb. 454.

7. 1 Fras. Dom. Rel. 82.

8. Bullock v. Bullock, 122 Mass. 3.

9. Thompson v. Thompson, 114 Mass. 566; Collins v. Collins, 80 N. Y. 1.

10. *In re* Elliott's Estate, 165 Cal. 339, 132 P. 439; Stokes v. Stokes, 198 N. Y. 301, 91 N. E. 793 (second marriage is absolutely void where

The weight of authority supports the doctrine that a marriage contract regularly entered into, though prohibited, may be repudiated by one of the parties as a nullity without dissolution by decree of court only when declared null and void by express statute. All marriage contracts not so declared a nullity upon their face are voidable and subject to repudiation only upon the entry of a judicial decree of dissolution. A marriage is not absolutely void in any case not expressly so declared by law when by the subsequent conduct of the parties it may be ratified, confirmed or made valid by cohabitation.

So when divorced parties remarried within the time when such remarriage was prohibited the marriage was voidable only, and when one of the parties married another he is guilty of bigamy.[11]

This case is to be distinguished from those where the statute renders void a marriage of divorced persons within the time allowed by law for a review on appeal of the judgment of the divorce court.[12]

wife knew or should have known that her former husband was alive); Hahn v. Hahn (Wash.), 176 P. 3.

11. State v. Yoder, 113 Minn. 503, 130 N. W. 10, L. R. A. 1916C, 686.

12. See, for example, McLennan v. McLennan, 31 Ore. 480, 50 Pac. 802, 38 L. R. A. 863; Wilhite v. Wilhite, 41 Kan. 154, 21 Pac. 173; Eaton v. Eaton, 66 Neb. 676, 92 N. W. 995, 60 L. R. A. 605.

CHAPTER X.

FRAUD, DURESS OR MISTAKE.

SECTION 1137. Force, Fraud, and Error in General.
1138. Nature of Fraud.
1139. Marriage Induced by Fraud Voidable.
1140. Fraudulent Purpose Does Not Render Marriage Void.
1141. Failure to Fulfill Promise of Further Ceremony.
1142. Concealed Intention Not to Perform Marriage Duties.
1143. Concealment of Past Unchastity.
1144. Pregnancy Concealed or Misstated.
1145. Concealment of Venereal Disease.
1146. Civil Action for Fraud Inducing Marriage.
1147. Parties to Action to Avoid Marriage for Fraud.
1148. Ratification of Marriage Induced by Fraud.
1149. Marriage Under Duress.
1150. Marriage Induced by Threat of Prosecution for Seduction.
1151. Error in Individual.
1152. Sham Marriage.

§ 1137. Force, Fraud, and Error in General.

All marriages procured by force or fraud, or involving palpable error, are void; for here the element of mutual consent is wanting, so essential to every contract.[13] The law treats a matrimonial union of this kind as absolutely void *ab initio,* and permits its validity to be questioned in any court; at the option, however, of the injured party, who may elect to abide by the consequences when left free to give or withhold assent. Force implies a physical constraint of the will; fraud, some deception practiced, whereby an unnatural state of the will is brought about.[14]

In most of the reported cases of force, fraud, and error, two or more of these elements are united; and frequently another distinct

13. 2 Kent Com. 76, 77; Harford v. Morris, 2 Hag. Con. 423; 4 Eng. Ec. 575; Countess of Portsmouth v. Earl of Portsmouth, 1 Hag. Ec. 355; 3 Eng. Ec. 154; Scott v. Shufeldt, 5 Paige, 43; Dalrymple v. Dalrymple, 2 Hag. Con. 54, 104; 4 Eng. Ec. 485; Keyes v. Keyes, 2 Fost. 553.

14. 1 Fras. Dom. Rel. 234.

impediment appears, such as tender years on the part of the injured party; or, with regard to the offender, the suppression of material facts relative to some former marriage, or to his own mental or physical incapacity; or some other cause of nullity is shown by the evidence. In the reported cases, where the complainant was successful, some unprincipled man has generally sought to gain undue advantages from the person and fortunes of one whose feebler will rendered her an easy prey; it rarely, if ever, appears that such force or fraud led to a reasonable and well-assorted match. Such unequal alliances need find favor from no tribunal.[15]

§ 1138. Nature of Fraud.

As to fraud, in order to vitiate a marriage, it should go to the very essence of the contract. But what constitutes this essence? The marriage relation is not to be disturbed for trifles, nor can the cumbrous machinery of the courts be brought to bear upon impalpable things. The law, it has been well observed, makes no provision for the relief of a blind credulity, however it may have been produced.[16] Fraudulent misrepresentations of one party as to birth, social position, fortune, good health, and temperament, cannot therefore vitiate the contract. *Caveat emptor* is the harsh but necessary maxim of the law. Love, however indispensable in an æsthetic sense, is by no means a legal essential to marriage; simply because it cannot be weighed in the scales of justice. So, too, all such matters are peculiarly within the knowledge of the parties themselves, and they are put upon reasonable inquiry.

A marriage induced by fraud may be void when the fraud goes

15. See Heffer v. Heffer, 3 M. & S. 265; Rex. v. Burton-upon-Trent, 3 M. & S. 537; Swift v. Kelly, 3 Knapp, 257; Nace v. Boyer, 6 Casey, 99; Robertson v. Cole, 12 Tex. 356; Cameron v. Malcolm, Mor. 12586, cited 1 Bish., § 199; Lyndon v. Lyndon, 69 Ill. 43; Powell v. Cobb, 3 Jones Eq. 456.

16. Lord Stowell, in Wakefield v. Mackay, 1 Phillim. 137; 2 Kent Com. 77.

to the essence,[17] but a false statement as to an immaterial fact will not invalidate it.[18]

§ 1139. Marriage Induced by Fraud Voidable.

Marriage induced by fraud is void only from the date when it is annulled by order of court.[19]

§ 1140. Fraudulent Purpose Does Not Render Marriage Void.

A marriage is not void *ab initio* and subject to annulment at suit of the woman simply because it was entered into by the man with the fraudulent purpose of preventing the woman from testifying against him in bastardy proceedings [20] or seduction [21] and of afterwards leaving her at once. Mere intention does not constitute enough, as there is here no misrepresentation as to a material fact. The marriage itself was legal although the purpose of the man in entering into it was fraudulent. He might have become of a better mind and have faithfully performed the duties of a husband, in which case there could have been no doubt of the

17. Orchardson v. Cofield, 171 Ill. 14, 49 N. E. 197, 40 L. R. A. 256, 63 Am. St. R. 211 (imposing on aged woman under delusion).

The law of marriage, in so far as property interests are concerned, is founded on business principles, in which the utmost good faith is required from all the parties, and the least fraud in connection therewith is the subject of judicial cognizance. Beach v. Beach, 160 Ia. 346, 141 N. W. 921; Leavitt v. Leavitt, 13 Mich. 452 (fraud operating to destroy intelligent consent at the time); Crane v. Crane, 62 N. J. Eq. 21, 49 A. 734 (falsely stating that not afflicted with syphilis); Weill v. Weill, 172 N. Y. S. 589 (concealing prior marriage and annulment).

18. Boehs v. Hanger, 69 N. J. Eq. 10, 59 A. 904 (that he had never before been married).

19. *While a defrauded party to an ordinary contract* may rescind, and the parties may voluntarily place themselves in their former position, rescission of marriage must be pronounced by a competent court. Jordan v. Missouri & Kansas Telephone Co., 136 Mo. App. 192, 116 S. W. 432; McCullen v. McCullen, 147 N. Y. S. 1069, 162 App. Div. 599.

21. Benton v. Benton, 1 Day (Conn.), 111.

21. Johnson v. Johnson (Ala.), 59 So. 418, 39 L. R. A. (N. S.) 518.

validity of the marriage, however apparent his fraud might be at the moment of solemnizing it.

§ 1141. Failure to Fulfill Promise of Further Ceremony.

Fraud can consist only in the misrepresentation of an existing fact, and the failure to keep a promise as to the future cannot be a fraud sufficient to avoid a marriage. So where a man persuaded a woman to marry him by promising to have a civil ceremony and also a Jewish wedding, and he performed a civil marriage with her and refused to go through a Jewish wedding, this is not a misstatement of an existing fact on which annulment may be based. The court declines to allow a misrepresentation of present intention to stand as a misstatement of an existing fact.[22]

§ 1142. Concealed Intention Not to Perform Marriage Duties.

The secret determination of a woman on contracting marriage to allow no marital relations with her husband, where such determination is persisted in constitutes such fraud as will justify an annulment of the marriage. The marital relations are the very essence of the marriage, and the consent of the husband to the marriage was thus obtained by fraudulent concealment of her intention not to carry out her part of the contract.[23]

Where the woman goes through the marriage ceremony with an intention never to perform the duties of a wife and solely to secure a right to bear the name of a married woman, and in that way to hide the shame of having had an illegitimate child, intending to leave her husband at the church door and not see him again, which plan she carried into effect, the husband is entitled to an annulment of the marriage for fraud.[24]

22. Schachter v. Schachter, 178 N. Y. Supp. 212.

23. Millar v. Millar, 175 Cal. 797, 167 Pac. 394, Ann. Cas. 1918E, 184.

24. Anders v. Anders, 224 Mass. 438, 113 N. E. 203, L. R. A. 1916E, 1273. See also Miller v. Miller, 31 Ohio L. J. 141; Barnes v. Wyethe, 28 Vt. 41.

So a secret intention not to live with the plaintiff after marriage is such fraud as renders it voidable.[25]

§ 1143. Concealment of Past Unchastity.

Not even does the concealment of previous unchaste and immoral behavior in general vitiate a marriage; for although this seems to strike into the essence of the contract, yet public policy pronounces otherwise, and opens marriage as the gateway to repentance and virtue.[26]

A marriage may be annulled for fraud even though fraud is made by statute a ground for divorce, and fraud exists where the woman conceals from the man the fact that her previous husband had obtained a divorce from her on the ground of adultery. It is settled law that the concealment by a woman of her previous unchastity is not sufficient to justify an annulment or a divorce, but this strict rule may be relaxed where the party deceived was young and inexperienced. So where a woman thirty years old persuades a youth of nineteen to marry her by concealing the fact that her former husband had obtained a divorce from her for her adultery, and this is a matter of public record, this is such fraud as to justify annulling the marriage.[27]

But it seems to be now settled in some States that where a woman induces a man to marry her by falsely stating to him her previous virtue, the marriage may be annulled. This seems to be contrary to the spirit of the times, as the same rule is not applied to an immoral man, but the result may be justified on the theory that women are expected to be more moral than men and their unchastity is likely to lead to worse results.[28]

25. Moore v. Moore, 94 Misc. 370, 157 N. Y. S. 819. See *post*, § 1158.

26. Rogers Ec. Law, 2d d., 644; 1 Fras. Dom. Rel. 231; Ayl. Parer. 362, 363; Swinb. Spousals, 2d ed., 152; Best v. Best, 1 Add. Ec. 411; 2 Eng. Ec. 158; Leavitt v. Leavitt, 13 Mich. 452; Weir v. Still, 31 Ia. 107.

27. Browning v. Browning, 89 Kan. 98, 130 P. 852, L. R. A. 1916C, 737.

28. Gatto v. Gatto (N. H.), 106 A. 493. See *post*, § 1158.

§ 1144. Pregnancy Concealed or Misstated.

Whenever an innocent man marries a woman, supposing her, with reason, to be virtuous, and she conceals her pregnancy from him, the subsequent production of another man's child so unpleasantly complicates the marriage relation that he ought to be allowed his exit if he so desires, both in justice to himself and because the woman knew the risk she ran of bringing the parental relation to shame by marrying, and chose to incur it. In short, while marriage may be accepted by anyone whose past life has been dissolute, as the portal to a new and honest career, for which reason concealment of the past cannot legally be predicated of either party as an essential fraud, we apprehend that the woman who brings surreptitiously to the marriage bed the incumbrance of some outside illicit connection introduces a disqualification to the union as real as the physical impotence of a man would be, resulting from his own lasciviousness.

Thus it is held that where a woman, pregnant by another man at the time of the nuptials, bears a child soon after to an innocent husband, the marriage may be avoided by him; for she has thereby not only inflicted upon him, by deception, the grossest possible moral injury, but subjected them both to scandal and ill-repute.[29] The court, however, has taken heed not to press this exception far, refusing to allow one to shake off the obligations he has contracted with a woman whom he knew before marriage to be with child, and in fact had himself debauched, notwithstanding he married upon the faith of her previous assurances that her pregnancy was by him, and was undeceived by the time the child came into the world.[30] And, furthermore, if a man marries any woman whom

29. Gondouin v. Gondouin, 14 Cal. App. 285, 111 P. 756; Lenoir v. Lenoir, 24 App. D. C. 160; Sinclair v. Sinclair, 57 N. J. Eq. 222, 40 A. 679; Fontana v. Fontana, 135 N. Y. S. 220, 77 Misc. 28, See, however, Lyman v. Lyman, 90 Conn. 399, 97 A. 312; Reynolds v. Reynolds, 3 Allen, 605. See also Baker v. Baker, 13 Cal. 87; Montgomery v. Montgomery, 3 Barb. Ch. 132; Morris v. Morris, Wright, 630. See *post*, § 1158.

30. Foss v. Foss, 12 Allen, 26. It was here suggested by the court that

he knows to be unchaste and pregnant, it is his own folly if he places implicit confidence in any of her statements.[31]

A young man is not entitled to have his marriage annulled for fraud when the woman persuaded him to marry her by falsely stating to him that she was pregnant by him when in fact she was pregnant by another man with whom she had intercourse about six weeks before she had relations with the plaintiff, when he was advised by his parents to wait and see whether the child was his, but he married the girl without heeding that advice. The fact that he had full knowledge of her unchastity should have put him on his guard and to take some steps to ascertain the truth of the charge made by her.[32]

The plaintiff in an action of divorce for fraud, having had sexual intercourse with the defendant before marriage, was induced to marry her by her representations made to and believed by him, that she was with child as the result of such intercourse, whereas the fact was, as she knew, or ought to have known, that she was pregnant by another man. The first knowledge that he had of the truth came to him when she was delivered. Thereupon he ceased to have further relations with her, and brought this action praying for an annulment of the marriage or a divorce. He is clearly not entitled to an annulment.[33]

The courts are practically agreed that antenuptial pregnancy by another man, if concealed by the wife from the husband, who was himself innocent of improper relations with her, is a fraud upon him, justifying a divorce or annulment of the marriage in

the man might haven taken medical or other advice before marriage, instead of relying upon the woman's word. In the former case a man would not have been expected to take such precautions.

31. Crehore v. Crehore, 97 Mass. 330.

32. Safford v. Safford, 224 Mass. 392, 113 N. E. 181, L. R. A. 1916F, 526. See *post*, § 1158.

33. Lyman v. Lyman, 90 Conn. 399, 97 A. 312, L. R. A. 1916E, 643. In some States, however, annulment would be the proper remedy. Safford v. Safford, 224 Mass. 392, 113 N. E. 181, L. R. A. 1916F, 526.

this country,[34] although the opposite result is reached in England.[35]

In this country, however, in most jurisdictions, illicit relations between the parties before marriage will bar the husband from a divorce on the ground of the wife's pregnancy by another man on the usual ground given that the plaintiff does not come into court with clean hands, and that he, knowing of her unchastity in her relations with him, was put upon her inquiry as to the confidence to be reposed in her word.[36] A recent leading case,[37] however, takes the view that where the man acted reasonably in believing her story, his act in marrying her was honorable, and that he does not enter the marriage contract in question with unclean hands, but in an effort to repair the wrong he thought he had done the woman, and where his act was induced by her fraudulent statement that she was pregnant by him, he is entitled to a divorce or to annulment as the practice in each State may require.

Where, however, the marriage is induced by false representations by the woman with whom the man has had intercourse that she is pregnant by him whereas in fact she is not pregant at all he is clearly entitled to no relief. It is not ground for divorce that either party was unchaste before marriage, for as the court remarks, "If it were, many a wife is entitled to divorce."[38]

§ 1145. Concealment of Venereal Disease.

The concealment of venereal disease by a party on marrying is such fraud as furnishes a good ground for annulment.[39]

34. Gould v. Gould, 78 Conn. 242, 61 A. 604, 2 L. R. A. (N. S.) 531; Reynolds v. Reynolds, 3 Allen (Mass.), 605; Harrison v. Harrison, 94 Mich. 559, 54 N. W. 275, 34 Am. St. R. 364; Baker v. Baker, 13 Cal. 87.

35. Moss v. Moss, L. R. (1897), P. 263.

36. Foss v. Foss, 12 Allen, 26; Crehore v. Crehore, 97 Mass. 330, 93 Am. Dec. 98; Fairchild v. Fairchild, 43 N. J. Eq. 473, 11 A. 426; Hoffman v. Hoffman, 30 Pa. 417; Scroggins v. Scroggins, 14 N. C. 535.

37. Lyman v. Lyman, 90 Conn. 399, 97 A. 312, L. R. A. 1916E, 643.

38. Bryant v. Bryant, 171 N. C. 746, 88 S. E. 147, L. R. A. 1916E, 648.

39. C—— v. C——, 158Wis. 301, 148 N. W. 865, 5 A. L. R. 1013.

§ 1146. Civil Action for Fraud Inducing Marriage.

One who by fraud and by concealing his marriage induces another to go through a marriage ceremony with him is liable to an action for the wrong done.[40]

Where a woman defrauds a man by inducing him to convey to her his property before marrying her which he does within the prohibited period after his divorce the parties are *in pari delicto* and the court will not interfere to restore the property to the man although the woman did after the marriage immediately turn him out of the house which he gave her and has never performed the duties of a wife. As the parties were both engaged in an illegal transaction they are left without remedy against each other and the law will refuse to lend its aid to either of them but will leave them where it finds them to suffer the consequences of their illegal acts.[41]

A wife may bring an action for fraud against a third person who induced her to marry her husband by falsely representing to her that he was the owner of certain land which he did not own. The law of marriage in so far as property interests are concerned is founded on business principles in which the utmost good faith is required from all the parties and the least fraud in connection therewith is the subject of judicial cognizance.

The measure of damages is not, however, one-third the value of the land. The test is what is the present loss to the plaintiff by reason of the fact that her husband did not own the land and such as the evidence shows she was reasonably sure to lose in the future depending somewhat upon her expectancy of life and the expectancy of life of her husband, and the jury must find what amount will make good her loss, present and prospective.[42]

40. Batty v. Greene, 206 Mass. 561, 92 N. E. 715; Colt v. O'Connor, 109 N. Y. S. 689, 59 Misc. 83; Larson v. McMillan, 99 Wash. 626, 170 P. 324 (damages based on financial condition of defendant at date of verdict).

41. Szlauzis v. Szlauzis, 255 Ill. 314, 99 N. E. 640, L. R. A. 1916C, 741.

42. Beach v. Beach (Ia.), 141 N. W. 921, 46 L. R. A. (N. S.) 98.

§ 1147. Parties to Action to Avoid Marriage for Fraud.

Only the party and not his executors can take advantage of the fraud.[43] The issue, we may add, is between the offender and the injured party, and third persons have no right to interfere, although it be alleged that there was intent to defraud them in their own property interests.[44] In fact, marriage stands or falls by public permission with reference only to the marriage parties; and wherever they have legally assumed the relation as one agreeable to themselves, outsiders cannot meddle with the status from outside considerations. Where, too, a marriage has been effected through the fraudulent conspiracy of third persons, the rule is that, unless one of the contracting parties is cognizant of the fraud, the marriage is perfect; but, if cognizant, it is to be deemed the fraud of such party and treated accordingly.[45]

§ 1148. Ratification of Marriage Induced by Fraud.

A marriage procured by fraud or duress may be ratified.[46]. All marriages of this sort are binding without further ceremony, provided the injured party sees fit to affirm it after all constraint is removed, or, in other words, to perfect the consent; but no such freedom of choice seems to be left to the offending party. Hence, this sort of marriage seems neither void nor voidable in the legal acceptation; but rather inchoate or incomplete until ratified, though void if the injured party choose so to treat it. Where consummation never followed the nuptials, the courts are the more readily disposed to set aside the match;[47] but in any event copu-

43. Tomppert's Ex'rs v. Tomppert, 76 Ky. 326, 26 Am. R. 197.

44. McKinney v. Clarke, 2 Swan, 321.

45. Sullivan v. Sullivan, 2 Hag. Con. 238, 246; Rex v. Minshull, 1 Nev. & M. 277; 1 Bish. Mar. & Div., § 173 *et seq.*; Barnes v. Wyethe, 28 Vt. 41; Bassett v. Bassett, 9 Bush, 695.

46. Shepherd v. Shepherd, 174 Ky. 615, 192 S. W. 658.

47. Lyndon v. Lydon, 69 Ill. 43; Robertson v. Cole, 12 Tex. 356; Cameron v. Malcolm, *supra.*

lation, with knowledge of the fraud, and after removal of all constraint, is an effectual bar to relief.[48]

A woman's fraudulent statements as to her virtue inducing marriage are not condoned by cohabitation where she continues her immoral conduct over her husband's objection.[49]

§ 1149. Marriage Under Duress.

What amount of force is sufficient to invalidate a marriage is a question of circumstances. Evidently the same test could not apply to the mature and the immature, to the strong and the weak, to man and to woman. The general rule is that such amount of force as might naturally serve to overcome one's free volition and inspire terror will render the marriage null.[50] And where the party employing force sustains a superior relation of influence, or a post of confidence afforidng him opportunities which he chooses to abuse, this circumstance carries great weight. Thus in *Harford* v. *Morris,* where one of the guardians of a young and timid school-girl, having great influence and authority over her, took her to a foreign country, hurried her from place to place, and then married her without her free consent, the marriage was set aside;[51] and similar consequences attended the marriage of a young school-girl to her father's coachman, who pursued his scheme while taking her out to ride.[52] Duress may appear also in the marriage of a very young girl in a strange country where she was without friends or money[53] or where the person was mentally incapable of resisting improper pressure.[54]

The fact that the father of a seduced girl made threats of per-

48. 1 Bish. Mar. & Div., 5th ed., §§ 214, 215; 1 Burge Col. & For. Laws, 137; 1 Fras. Dom. Rel. 229; Scott v. shufeldt, 5 Paige, 43; Leavitt v. Leavitt, 13 Mich. 452; Hampstead v. Plaistow, 49 N. H. 84.

49. Entsminger v. Entsminger, 99 Kan. 362, 161 P. 607.

50. Shelf. Mar. & Div. 213; 1 Bish. Mar. & Div., 5th ed., § 211.

51. 2 Hag. Con. 423; 4 Eng. Ec. 575.

52. Lyndon v. Lyndon, 69 Ill. 43.

53. Avakian v. Avakian, 69 N. J. Eq. 89, 60 A. 521.

54. Shepherd v. Shepherd, 174 Ky. 615, 192 S. W. 658.

sonal violence is also not a ground for divorce where it does not appear that the plaintiff could not have had protection by causing the father to be bound over to keep the peace,[55] but duress may appear where the marriage was the result of a threat of the girl's father to kill the man if he did not.[56]

A woman is not entitled to a divorce on account of a prior marriage entered into by the man on account of duress which marriage had been declared void by a decree of court, although the decree was after the date of the second marriage. In this case the man after the marriage into which he was forced left his wife and never lived with her. His subsequent assent would have made his voidable marriage valid; but as this was not given, it was void *ab initio* and imposed no obligation on him.[57] It seems that according to the weight of authority a marriage entered into under duress is voidable only and not void[58] though there is some authority that it is void *ab initio*.[59]

§ 1150. Marriage Induced by Threat of Prosecution for Seduction.

So marriage by compulsion is procured when one under illegal arrest is forced to marry; and so probably, though the arrest was legal, if malicious circumstances are manifest.[60] But if a single

55. Bryant v. Bryant (N. C.), 88 S. E. 147, 1916E, 648.

56. Fowler v. Fowler, 131 La. 1088, 60 So. 694. See Meredith v. Meredith, 79 Mo. App. 636.

57. Taylor v. White, 160 N. C. 38, 75 S. E. 941, L. R. A. 1916C, 704.

58. Bostick v. State, 1 Ala. App. 255, 55 So. 260; Hampstead v. Plaistow, 49 N. H. 84.

59. Bassett v. Bassett, 9 Bush (Ky.), 696.

60. Reg. v. Orgill, 9 Car. & P. 80; Soule v. Bonney, 37 Me. 128; Collins v. Collins, 2 Brews. (Pa.) 515; Barton v. Morris, 15 Ohio, 408; Benton v. Benton, 1 Day, 111. See *post*, § 1159.

A man is sometimes forced into a marriage which ought to be annulled. See Bassett v. Bassett, 9 Bush, 696. In Willard v. Willard, 6 Baxter, 297, before testimony was taken, an allegation of duress was sustained against demurrer. Here the man claimed that the woman's brother seized him on the highway, and forced him to marry her, and that as soon as the duress was over he escaped; also that the woman had a child three months afterwards. Duress was claimed by the husband in Vroom v. Marsh, 29 N. J.

man under legal arrest, by advice of the officer or magistrate, marries the woman whom he has seduced or got with bastard offspring, in order to escape prosecution, the law will favor a presumption of honest repentance on his part, and hold him bound,[61] substantial justice being thereby done to the utmost, and the lesser scandal to society permitted in order to avert the greater.

A marriage will not be held to be under duress where the man marries to escape criminal prosecution for seduction of the girl,[62] and a marriage is not under duress simply because it is made under the provisions of a statute permitting one to escape prosecution for seduction by marrying his victim.[63]

The fact that the father of a woman with whom the plaintiff had had intercourse and who claimed to be pregnant by him threatened the plaintiff with criminal prosecution if he did not marry her is not a reason for divorce when it appears that she is not pregnant as if he were not guilty of the charge it would not have hurt him and a proceeding for bastardy is civil and not criminal in that jurisdiction.[64]

§ 1151. Error in Individual.

As to error, it may be said, as in fraud, that the error should reach the essentials; and Chancellor Kent justly observes that it would be difficult to find a case where simple error, without some other element, would be permitted to vacate a marriage. There is an English case in point where a man courted and afterwards married a young lady, believing her to be a certain rich widow,

Eq. 15, but the court allowed alimony *pendente lite* to the wife, she denying the charge.

61. Jackson v. Winne, 7 Wend. 47; Sickles v. Carson, 26 N. J. Eq. 440; Honnett v. Honnett, 33 Ark. 156; State v. Davis, 79 N. C. 603; Johns v. Johns, 44 Tex. 40; Williams v. State, 44 Ala. 24. See *post*, § 1158.

62. Griffin v. Griffin, 130 Ga. 527, 61 S. E. 16, 16 L. R. A. (N. S.) 937; Blankenmiester v. Blakenmiester, 106 Mo. App. 390, 80 S. W. 706; State v. English, 101 S. C. 304, 85 S. E. 721, L. R. A. 1915F, 977; Thorne v. Farrar, 57 Wash. 441, 107 P. 347.

63. State v. English (S. C.), 85 S. E. 721, L. R. A. 1915F, 977.

64. Bryant v. Bryant (N. C.), 88 S. E. 147, L. R. A. 1916E, 648.

whom he had known only by reputation.[65] She and her friends had countenanced the deception. It was held, nevertheless, that the marriage must stand.[66] But the palpable substitution of some other individual for the person actually accepted and intended for marriage may properly be repudiated by the victim to the fraud.[67] And some cases have gone even farther, as where a scoundrel palms himself off as a certain individual of good repute.[68]

Error as to the chastity of a wife is not a "mistake in the person" within the terms of a statute allowing annulment of a marriage for that reason.[69]

§ 1152. Sham Marriage.

The element of imperfect consent is readily associated with cases of the present class. Thus, if a person is unwittingly entrapped into a marriage ceremony, not meaning nor affording reason for the other party to believe that it should be binding, this marriage may be repudiated.[70] And in general a mock marriage in jest is no marriage.[71]

One is not guilty of rape who by a sham marriage induces a woman to live with him as his wife, as no force is used, and consent is obtained, and a statute declaring that rape occurs when a woman is induced to consent to sexual intercourse by a trick of one causing her to believe that he is her husband does not apply to such a case, but is directed to a deceit as to the identity of the man with whom she is induced to cohabit.[72]

65. 2 Kent Com. 77. See Lord Campbell, in Reg. v. Millis, 10 Cl. & F. 534, 785; 1 Bish. Mar. & Div., 5th ed., § 207; Clowes v. Clowes, 3 Curt. Ec. 185, 191.

66. Feilding's Case, cited in Burke's Celebrated Trials, 63, 78, and in 1 Bish. Mar. & Div., 5th ed., § 204.

67. Fiction supplies such instances, as in Scott's novel of St. Ronan's Well. And see 2 Kent Com. 77.

68. Rex v. Burton, 3 M. & S. 537.

69. Delpit v. Young, 51 La. Ann. 923, 25 So. 547.

70. Clark v. Field, 13 Vt. 460.

71. McClurg v. Terry, 21 N. J. Eq. 225. See *post*, § 1158.

72. Draughn v. State (Okla. Crim. Rep.), 158 Pac. 890, L. R. A. 1916F, 793.

CHAPTER XI.

ANNULMENT AND VALIDATION.

SECTION 1153. Annulment Distinguished from Divorce.
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§ 1153. Annulment Distinguished from Divorce.

Proceedings for annulling a marriage have one obvious distinction from actions for divorce in that the latter is predicated on a valid marriage while an action for annulment presupposes that the marriage is void or voidable. The latter is based on facts existing at the time of the marriage, while an action for divorce is necessarily based on matters occurring since marriage.[73]

But neither legislators nor the courts in these times adhere to so strict a distinction. Impotence, for instance, is frequently classified among the grounds for divorce; while proceedings for nullity are quite similar in most respects to those for divorce; and hence the decree of nullity may sometimes be found stated as a third kind of divorce in addition to those specified in the preceding paragraph.

73. Millar v. Millar (Cal.), 167 P. 394; Henderson v. Ressor, 265 Mo. 718. 178 S. W. 175.

A decree of nullity has long been available in practice, in cases which touch the root of the marriage consummation, as where there was mental or physical incapacity, fraud, force, or error, non-age, consanguinity or affinity, a former spouse living, or other fundamental impediment to the union. Now, though all these are to be distinguished in strict sense from causes of divorce, historically and on *a priori* reason, inasmuch as they impeach the marriage itself *ab initio,* our present divorce statutes incline to give the term "divorce" the widest possible scope; and taking into view, moreover, the imperfect matrimonial jurisdiction which American courts may profess to exercise upon ecclesiastical analogies, our legislators frequently specify causes of nullity as in reality causes of divorce, making the same course of procedure substantially for matters inherent to the contract of marriage and those consequent upon the marriage state. Hence, in common parlance, divorce is sought as to one or more of the impediments above mentioned; some of our local divorce statutes, however, making express distinction so that nullity shall be the sentence in the one case and divorce in the other.[75]

Such statute provisions do not often extend the cause of divorce beyond that to which the doctrine of nullity properly applies. And even while pronouncing certain marriages void on such grounds, independently of a decree of divorce, courts yet prefer that the decree be rendered so as to conduce to good order and decorum and the benefit of the public.

§ 1154. Jurisdiction for Annulment.

The question of jurisdiction for annulment is confused by the very real confusion in our decisions between divorce and annulment. There is a clear distinction between them, and their

75. Browne's Digest of Divorce, Part I., shows that impotence or physical incapacity is a specified cause of divorce in nearly all of the States; bigamy in very many; fraud and force in very many; mental incapacity in many; non-age in many; consanguinity and affinity in many.

effects. Divorce expressly or impliedly sustains the validity of the marriage. One of the steps in obtaining a divorce is to prove a valid marriage. Annulment on the other hand proceeds on the theory that no marriage ever existed. Jurisdiction in divorce depends on domicile, but it seems that a suit for annulment of the *res* of the marriage should be brought where the *res* was created, that is, in the State where the marriage was celebrated, and there is some authority for this, which we submit is the correct view.[76] The great weight of authority, however, seems to put jurisdiction for annulment on the basis of domicile[77] largely as a result of statutory confusion between the two and partly on account of the failure of the courts to distinguish between them.[78]

§ 1155. What Law Governs Annulment.

There is much confusion in the cases as to jurisdiction for annulment, which confusion arises largely on account of the failure of many courts to observe the distinction between divorce and annulment. Divorce is based on a valid marriage, while annulment is based on the claim that there never was a marriage. Divorce is based on things happening after the marriage, while annulment is based on the ceremony itself. It is well settled that a marriage valid where made is valid everywhere, and therefore it is thought by some courts that only the jurisdiction where the marriage is celebrated should have power to annul it. This view is logical and seems correct on theory, and has some well-consid-

76. Cummington v. Belchertown, 149 Mass. 223, 21 N. E. 435; Levy v. Downing, 213 Mass. 334, 100 N. E. 638; Garcia v. Garcia, 25 S. D. 645, 127 N. W. 586. See learned article by Professor Herbert F. Goodrich in 32 Harvard Law Review, 806.

77. Roth v. Roth, 104 Ill. 35; Avakian v. Avakian, 69 N. J. Eq. 89, 60 A. 521; Kitzman v. Kitzman (Wis.), 166 N. W. 789.

78. See Piper v. Piper, 46 Wash. 671, 91 P. 189, holding that a statute providing for service by publication in divorce actions applies to nullity suits. The opposite result was reached, however, in Bisby v. Mould, 138 Ia. 15, 115 N. W. 489.

The time for residence required for divorce suits is held applicable to annulment in Wilson v. Wilson, 95 Minn. 464, 104 N. W. 300; Eliot v. Eliot,

ered decisions in line with it,[79] but probably in most States the distinction between divorce and annulment is lost sight of, and it is usually said that jurisdiction for annulment depends on the domicile of the parties just like divorce.[80]

In England the rule seems to be that both the court where the marriage was celebrated [81] and the court where the respondent is domiciled [82] have jurisdiction to annul it. The English courts, however, with seeming inconsistency, will not recognize a foreign decree of annulment by a jurisdiction where the parties are domiciled when the marriage took place in England.[83]

§ 1156. Statutes Governing.

Actions for annulment are commonly provided for by statute in this country,[84] and where so provided for the statutory process must be followed [85] with appropriate process, petition and other

77 Wis. 634, 46 N. W. 806, and not in Montague v. Montague, 25 S. D. 471, 127 N. W. 639, Ann. Cas. 1912C, 591.

79. Levy v. Downing, 213 Mass. 334, 100 N. E. 638; Garcia v. Garcia, 25 S. D. 645, 127 N. W. 586. See learned article on the subject by Herbert F. Goodrich in 32 Harvard Law Review, 806.

80. Roth v. Roth, 104 Ill. 35; Blumenthal v. Tannenholz, 31 N. J. Eq. 194; Cunningham v. Cunningham, 206 N. Y. 341, 99 N. E. 845; Barney v. Cuness, 68 Vt. 51, 33 A. 897. See Avakian v. Avakian, 69 N. J. Eq. 89, 60 A. 521; Kitzman v. Kitzman (Wis.), 166 N. W. 789. See Bays v. Bays, 174 N. Y. Supp. 212.

81. Linke v. Van Aerde, 10 L. T. R. 426; Simonin v. Mallac, 2 Sw. & Tr. 67; Sottomayor v. De Barros, 3 P. D. 1; Sproule v. Hopkins (1903), 2 Ir. 133.

82. Bater v. Bater (1906), P. 209; Johnson v. Cooke (1898), 2 I. R. 130.

83. Ogden v. Ogden (1908), P. 46, 78.

84. Koehler v. Koehler (Ark.), 209 S. W. 283; Freda v. Bergman, 77 N. J. Eq. 46, 76 A. 460.

An act authorizing annulment is not retroactive and does not apply to a marriage celebrated before its enactment. Williams v. Brokaw, 74 N. J. Eq. 561, 70 A. 665; 113 N. Y. S. 142, 128 App. Div. 838, reversed; Stokes v. Stokes, 198 N. Y. 301, 91 N. E. 793; Davis. v. Whitlock, 90 S. C. 233, 73 S. E. 171.

85. Mackey v. Peters, 22 App. D. C. 341 (lunacy may be adjudged in the proceeding for annulment); Reed v. Reed, 175 N. Y. S. 264; Conte v. Conte, 81 N. Y. S. 923, 82 App. Div. 335, 34 Civ. Proc. R. 50, 13 N. Y. Ann. Cas. 679; Selby v. Selby, 27 R. I. 172, 61 A. 142; Kelly v. Scott, 5

pleadings.[86] Where not covered by statute, proceedings for annulment may be brought in equity and depend on the general equity powers of the court.[87]

§ 1157. Grounds for Annulment in General.

Where annulment of a marriage is covered by statute the court can act only on grounds prescribed in the statute, except for lunacy and fraud,[88] but the fact that the statute enumerates certain grounds for annulment of a marriage may not imply that no others exist,[89] and considerations of public policy and the welfare of the children should be considered.[90]

§ 1158. Fraud.

A marriage procured by fraud is voidable at suit of the injured party,[91] but only as to matters touching the essentials of the mar-

Grat. (Va.) 479 Martin v. Martin, 54 W. Va. 301, 46 S. E. 120. See People v. Schoonmaker, 119 Mich. 242, 77 N. W. 934, 5 Det. Leg. N. 802 (marriage of persons under age of consent deemed void without legal process).

86. Pyott v. Pyott, 191 Ill. 280, 61 N. E. 88 (petition for annulment inserted in cross-bill in action for separate maintenance); Tefft v. Tefft, 35 Ind. 44 (pleading in divorce petition may stand as petition for annulment); Johannessen v. Johannessen, 128 N. Y. S. 892, 70 Misc. 361.

87. Wimbrough v. Wimbrough, 125 Md. 619, 94 A. 168 (procured by fraud); Henerson v. Ressor, 265 Mo. 718, 178 S. W. 175.

An action to annul a marriage is one in equity, and subject to the rule that plaintiff must appear with clean hands. Marre v. Marre, 184 Mo. App. 198, 168 S. W. 636. See Floyd County v. Wolfe, 138 Ia. 749, 117 N. W. 32.

88. Davidson v. Ream, 161 N. Y. S. 73, 97 Misc. 89.

89. Browning v. Browning, 89 Kan. 98, 130 P. 852, L. R. A. 1916C, 737.

90. Libman v. Libman, 169 N. Y. S. 900, 102 Misc. 443.

91. Henneger v. Lomas, 145 Ind. 287, 44 N. E. 462, 32 L. R. A. 848; Vazakas v. Vazakas, 109 N. Y. S. 568; Robert v. Robert, 150 N. Y. S. 366, 87 Misc. 629 (representations that would put money together and buy hotel); Libman v. Libman, 169 N. Y. S. 900, 102 Misc. 443 (misrepresentations as to past life); Weill v. Weill, 172 N. Y. S. 589 (where the marriage would not have taken place but for the fraud); Thompson v. Thompson (Tex. Civ. App.), 202 S. W. 175, 203 S. W. 939.

riage relation,[92] as where the defendant marries intending never to perform the duties of the relation and the marriage is not consummated,[93] and not by anything less,[94] as, for example, concealment of a former marriage and divorce is not a ground for avoiding a marriage.[95] A marriage is not made voidable by a false statement by a man that he had never had intercourse with women before,[96] or concealment by the woman of the fact that she had had a bastard child,[97] or where the false representations were

92. Entsminger v. Entsminger, 99 Kan. 362, 161 P. 607 (as to defendant's reputation and virtue); Reynolds v. Reynolds, 85 Mass. 605; Foss v. Foss, 94 Mass. 26; Smith v. Smith, 171 Mass. 404, 50 N. E. 933, 41 L. R. A. 800, 68 Am. St. R. 440 (no express representations need be proved); Crane v. Crane, 62 N. J. Eq. 21, 49 A. 734; Boehs v. Hanger, 69 N. J. Eq. 10, 59 A. 904; Di Lorenzo v. Di Lorenzo, 174 N. Y. 467, 67 N. E. 63, 63 L. R. A. 92, 95 Am. St. R. 609 (that plaintiff the father of defendant's child); Roth v. Roth, 161 N. Y. S. 99, 97 Misc. 136 (concealment of fact that defendant had been divorced for adultery); Sobol v. Sobol, 150 N. Y. S. 248, 88 Misc. 277 (concealment of tuberculosis); Bahrenburg v. Bahrenburg, 150 N. Y. S. 589, 88 Misc. 272 (must be such misrepresentation as to deceive person of ordinary prudence).

93. Anders v. Anders, 224 Mass. 438, 113 N. E. 203; Moore v. Moore, 157 N. Y. S. 819, 94 Misc. 370. See Millar v. Millar (Cal.), 167 P. 394 (waiver where plaintiff marries knowing of defendant's determination). See Beckermeister v. Beckermeister, 170 N. Y. S. 22. See *ante*, § 1142.

94. Johnson v. Johnson, 176 Ala. 449, 58 So. 418 (marriage to prevent wife from testifying against him and with intention of abandonment); Williamson v. Williamson, 34 App. D. C. 536 (false statement as to temper); Lyon v. Lyon, 230 Ill. 366, 82 N. E. 850, 13 L. R. A. (N. S.) 996, affirming judgment, Same v. Barney, 132 Ill. App. 45 (false statement as to epilepsy); Allen v. Allen, 95 A. 363 (hereditary insanity); Allen v. Allen, 85 N. J. Eq. 55, 95 A. 363, 99 A. 309 (belief in hereditary insanity erroneously held); Schaeffer v. Schaffer, 144 N. Y. S. 774, 160 App. Div. 48, motion for leave to appeal denied, 145 N. Y. S. 1144, 161 App. Div. 887 (untrue protestations of love); Williams v. Williams, 130 N. Y. S. 875, 71 Misc. 590 (statement of man 20 years old that he was 21, and that woman would remain at home). See Gumbiner v. Gumbiner, 131 N. Y. S. 85, 72 Misc. 211 (doubtful case of tuberculosis).

95. Trask v. Trask, 114 Me. 60, 95 A. 352.

96. Hull v. Hull, 191 Ill. App. 307; Glean v. Glean, 75 N. Y. S. 622, 70 App. Div. 576, 10 N. Y. Ann. Cas. 473.

97. Shrady v. Logan, 40 N. Y. S. 1010, 17 Misc. 329, 3 N. Y. Ann.

known by the other party at the time to be false,[98] or where the plaintiff married against warning and without investigation.[99]

A marriage may be annulled for fraud when secured by false representations by the plaintiff's friends.[1]

§ 1159. Duress.

A marriage procured by duress will be annulled unless ratified.[2] The fact that the marriage is undertaken by the man to avoid criminal proceedings for seduction does not constitute duress of itself,[3] but may be so where unfairly prosecuted.[4] The duress must have been exerted by the other party or he must have been cognizant of it.[5]

Cas. 198. See Gard v. Gard (Mich.), 169 N. W. 908 (pregnancy by another man).

98. Donnelly v. Strong, 175 Mass. 157, 55 N. E. 892; McGill v. McGill, 163 N. Y. S. 462, 99 Misc. 86, 166 N. Y. S. 397, 179 App. Div. 343 ("full knowledge" defined).

99. Safford v. Safford, 224 Mass. 392, 113 N. E. 181. See *ante*, § 1143.

1. Pyott v. Pyott, 191 Ill. 280, 61 N. E. 88, 90 Ill App. 210 (where plaintiff a degenerate).

2. Beeks v. Beeks, 66 Fla. 256, 63 So. 444 (only where the duress dominated throughout); Quealy v. Waldron, 126 La. 258, 52 So. 479, 27 L. R. A (N. S.) 803 (threats inspiring just fear of great bodily harm); Simmons v. Stevens, 132 La. 675, 61 So. 734 (penalty of death); Marsh v. Whittington, 88 Miss. 400, 40 So. 326.

"*Duress*," which will invalidate a marriage, must be fear of that degree of violence threatened or actually inflicted sufficient to overcome the mind and will of a person of ordinary firmness, and must be exercised when the contract is entered into, and a mere apprehension of physical injury is not sufficient. Marre v. Marre, 184 Mo. App. 198, 168 S. W. 636; Houle v. Houle, 166 N. Y. S. 67, 100 Misc. 28 (coercion by threats of violence). See Nicholson v. Nicholson (Cal.), 163 P. 219 (not by threat to involve plaintinff in criminal case as an accomplice).

3. Sherman v. Sherman, 156 N. W. 301; Pray v. Pray, 128 La. 1037, 55 So. 666; Collins v. Ryan, 49 La. Ann. 1710, 22 So. 920, 43 L. R. A. 814; Wimbrough v. Wimbrough, 125 Md. 619, 94 A. 168; Ingle v. Ingle (N. J. Ch. 1897), 38 A. 953; Gass v. Gass (Tex. Civ. App.), 182 S. W. 1195; Thorne v. Farrar, 57 Wash. 441, 107 P. 347. See *ante*, § 1150.

4. Hawkins v. Hawkins, 142 Ala. 571, 38 So. 640, 110 Am. St. R. 53.

5. Shepherd v. Shepherd, 174 Ky. 615, 192 S. W. 658.

§ 1160. Defences in General.

The equities intervening to prevent annulment of a void marriage must be extraordinary and only to prevent fraud,[6] as that the prior marriage of defendant relied on had been dissolved.[7]

§ 1161. Condonation and Collusion.

Condonation as known in divorce actions is not a defence to annulment,[8] but it is a good defence to an action to annul a marriage that the parties continued to live together as man and wife,[9] or that there was collusion between the parties.[10]

§ 1162. Estoppel to Contest Validity of Marriage.

One who knowingly deceives the other party as to the validity of their marriage may be thereby estopped to contest its validity,[11] but not where he enters on the marriage in good faith, believing

6. Tiedeman v. Tiedeman, 157 N. Y. S. 1101, 94 Misc. 449.

7. Post v. Post, 133 N. Y. S. 1057, 149 App. Div. 452 (affg. judg., 129 N. Y. S. 754, 71 Misc. 44).

8. Millar v. Millar (Cal.) 167 P. 394.

9. Koehler v. Koehler (Ark.), 209 S. W. 283 (concealment of syphilis); Alexander v. Alexander, 36 App. D. C. 78; Mick v. Mart (N. J. Ch., 1907), 65 A. 851; Steimer v. Steimer, 74 N. Y. S. 714, 37 Misc. 26; Wendel v. Wendel, 52 N. Y. S. 72, 30 App. Div. 447; McGill v. McGill, 166 N. Y. S. 397, 179 App. Div. 343, 163 N. Y. S. 462, 99 Misc. 86 (waiving duress).

If petitioner was married when she attempted to marry defendant, in reliance upon an alleged invalid divorce which he showed to her, that she continued to cohabit with defendant did not put her *in pari delicto*, so as to prevent her having the marriage with defendant annulled. Lynch v. Lynch, 34 R. I. 261, 83 A. 83; Gass v. Gass (Tex. Civ. App.), 182 S. W. 1195.

That defendant permitted his wife to live in the same house with him for 17 months, held not a confirmation of the marriage, so as to bar annulment for her fraud, consisting of her infection with chronic gonorrhea. C—— v. C——, 158 Wis. 301, 148 N. W. 865; *contra*, Earle v. Earle, 126 N. Y. S. 317.

10. Svenson v. Svenson, 79 N. Y. S. 657, 78 App. Div. 536, 178 N. Y. 54, 70 N. E. 120.

11. Knaps v. Graugnard, 10 Rob. (La.) 21; Shrader v. Shrader (Miss.), 81 So. 227; Coad v. Coad, 87 Neb. 290, 127 N. W. 455; Chamberlain v. Chamberlain, 68 N. J. Eq. 414, 59 A. 813, 68 N. J. Eq. 736, 62 A. 680, 111 Am. St. R. 658; *contra*, *In re* Sloan's Estate, 50 Wash. 86, 96 P. 684; Sloan v. West, *Id.*

it legal,[12] and the question whether a marriage can be sustained may depend on whether it was entered into in good faith.[13]

Estoppel may arise by a statement by the parties to the public authorities that they are married,[14] and one may be estopped to claim rights as widow of a deceased person where she is at the time of his death living with another.[15]

There can be no estoppel where the marriage is absolutely void,[16] and the rule of *pari delictu* will not be applied to prevent relief in a suit to annul and set aside a void marriage, as that is a matter in which the State is an interested party.[17]

There is a growing feeling that the doctrine of *pari delictu* should not be applied to actions for nullity of marriage on the ground that the State is interested in the question, that the decree of annulment would establish the status of the parties beyond any doubt and also the status of any future wife and children in case the defendant should remarry. So a marriage may be annulled under this doctrine even though both parties knew at the time it was contracted that one of them had a spouse living or that the marriage was otherwise defective.[18]

§ 1163. Plaintiff's Fault as Defence.

The petition for annulment will not be barred by the fault of the plaintiff as the State is interested.[19]

12. Hilton v. Roylance, 25 Utah, 129, 69 P. 660, 58 L. R. A. 723, 95 Am. St. R. 821.

13. Locklayer v. Locklayer, 139 Ala. 354, 35 So. 1008 (with negro); Gardner v. Gardner (Mass.), 122 N. E. 308.

14. *In re* Spondre, 162 N. Y. S. 943, 98 Misc. 524 (immigrants on landing).

15. *In re* Hilton's Estate (Pa.), 106 A. 69.

16. Arado v. Arado (Ill.), 117 N. E. 816, 205 Ill. App. 261; Arado v. Arado, 281 Ill. 123, 117 N. E. 816 (cousins).

17. Szlauzis v. Szlauzis, 255 Ill. 314, 99 N. E. 640, L. R. A. 1916C, 741.

18. Davis v. Green (N. J. Eq.), 108 A. 772.

19. Szlauzis v. Szlauzis, 255 Ill. 314, 99 N. E. 640; Snell v. Snell, 191 Ill. App. 239. See Berus v. Berus, 146 N. Y. S. 554, 83 Misc. 624, where plaintiff's pregnancy was the inducing cause of the marriage, and petition was dismissed.

§ 1164. Custody of Children.

The court on annulling a marriage may be authorized to award the custody and support of children,[20] but such statutes may apply only to those marriages voidable for force or fraud.[21]

§ 1165. Division of Property.

Where a decree of nullity is entered the court may have authority to make an equitable division of the property of the parties,[22] although the party at fault may be barred by his own wrong from having restitution.[23]

§ 1166. Alimony and Counsel Fees.

The question of the allowance of counsel fees and temporary alimony may, in the absence of statute controlling the matter, depend on whether the marriage was valid and which party brings the action. If the marriage was void *ab initio* neither temporary alimony nor counsel fees should be allowed, as they both depend

In England a decree of dissolution may be refused even for the wife's adultery because of the plaintiff's own conduct conducing to her acts. See Everett v. Everett, 121 L. T. R. (C. A.) 503.

20. State v. Barilleau, 128 La. 1033, 55 So. 664.

The mere fact that a woman's prior undissolved marriage renders her subsequent marriage void does not make her "the guilty party" in a proceeding to nullify the marriage, within Pub. St. 1901, ch. 175, § 13, authoring an order against the guilty party providing for the support of a child. Bickford v. Bickford, 74 N. H. 448, 69 A. 579; Palmer v. Palmer, 79 N. J. Eq. 496, 82 A. 358; Baylis v. Baylis, 131 N. Y. S. 671, 146 App. Div. 517. See Caulk v. Caulk, 91 Neb. 638, 136 N. W. 845 (parent of minor husband cannot be ordered to support child).

21. Michels v. Fennell, 15 N. D. 188, 107 N. W. 53; Park v. Park, 53 N. Y. S. 677, 24 Misc. 372.

22. Coats v. Coats, 160 Cal. 671, 118 P. 441; Werner v. Werner, 59 Kan. 399, 53 P. 127, 41 L. R. A. 349, 68 Am. St. R. 372; *In re* Van Alstine, 21 Wash. 194, 57 P. 348; Buckley v. Buckley, 50 Wash. 213, 96 P. 1079; Knoll v. Knoll (Wash.), 176 P. 22 (treating relation as partnership).

23. Szlauzis v. Szlauzis, 255 Ill. 314, 99 N. E. 640.

in theory on the existence of a valid marriage creating in the husband duties of support.[24] If the husband brings the action and the wife claims that the marriage is valid, alimony and counsel fees may be allowed on the theory that the marriage will be considered valid until pronounced otherwise.[25] But if the wife brings the action the majority of the courts take the view that she is estopped to claim alimony or counsel fees, as she by her action is claiming that the marriage is void.[26]

On either theory it seems clear that the duty to pay alimony ceases on death of the husband, and therefore where an action for nullity is brought after his death by his relatives no allowance should be made.[27] So where a parent seeks annulment of the divorce of his infant living son no alimony should be allowed, as the parent is a stranger so far as alimony is concerned.[28]

The power of the court to award alimony and counsel fees in actions for nullity depends on local statute. The power of the court to award alimony in divorce actions does not give it power to do the same in actions for nullity,[29] though in some decisions it has been held that the power to award alimony is incidental to the power to annul,[30] while in some States the power to award

24. Sinclair v. Sinclair, 57 N. J. Eq. 222, 40 A. 679; Knott v. Knott (N. J.), 51 A. 15.

25. Ricard v. Ricard, 143 Iowa, 182, 121 N. W. 525, 26 L. R. A. (N. S.) 500; Vroom v. Marsh, 29 N. J. Eq. 15; North v. North, 1 Barb. Ch. (N. Y.) 241.

26. Jones v. Brinsmade, 183 N. Y. 258, 76 N. E. 22, 3 L. R. A. (N. S.) 192; *contra*, Lea v. Lea, 104 N. C. 603, 10 S. E. 488.

27. Farnham v. Farnham (N. Y.), 124 N. E. 894.

28. Stivers v. Wise, 46 N. Y. Supp. 9, 18 App. Div. 316.

29. Erwin v. Erwin, 180 S. W. 186; Adams v. Holt, 214 Mass. 77, 100 N. E. 1088; Higgins v. Sharp, 164 N. Y. 4, 58 N. E. 9, affg. 64 N. Y. S. 1137, 51 App. Div. 631; Jones v. Brinsmade, 183 N. Y. 258, 76 N. E. 22, 3 L. R. A. 192, 111 Am. St. R. 746, revg. 93 N. Y. S. 674, 104 App. Div. 619; Schroter v. Schroter, 107 N. Y. S. 1065, 57 Misc. 199; Park v. Park, 53 N. Y. S. 677, 24 Misc. 372; Stivers v. Wise, 46 N. Y. S. 9, 18 App. Div. 316; *contra*, Hart v. Hart, 198 Ill. App. 555.

30. Webb v. Brooke, 144 Mich. 674, 108 N. W. 358, 13 Det. Leg. N. 268.

alimony in actions for nullity is expressly conferred by law or by practice,[31] but the order cannot be made subsequent to the decree.[32]

The court should not refuse to hear the case until the alimony is paid where the plaintiff is unable to pay it.[33]

A woman is not entitled to alimony where at fault.[34]

§ 1167. Dissolution of Voidable Marriage by Agreement.

Even a voidable marriage cannot be dissolved by mutual consent of the parties.[35]

31. Dunphy v. Dunphy, 161 Cal. 87, 118 P. 445; Stapleberg v. Stapleberg, 77 Conn. 31, 58 A. 233 (provision applies though parties were never legally married and marriage void *ab initio;* Alexander v. Alexander, 36 App. D. C. 78 (no alimony awarded where petition denied; Huffman v. Huffman, 51 Ind. App. 330, 99 N. E. 769; Ricard v. Ricard, 143 Ia. 182, 121 N. W. 525; Gard v. Gard (Mich.), 169 N. W. 908 (counsel fees awarded to wife against whom annulment ordered); Willits v. Willits, 76 Neb. 228, 107 N. W. 379, 5 L. R. A. 767; Poupart v. District Court of Seventh Judicial Dist., 34 Nev. 336, 123 P. 769; Erlanger v. Erlanger, 159 N. Y. S. 353, 173 App. Div. 767; Oppenheimer v. Oppenheimer, 138 N. Y. S. 643, 153 App. Div. 636; Sutton v. Sutton, 130 N. Y. S. 368, 145 App. Div. 845; Hunt v. Hunt, 23 Okla. 490, 100 P. 541; *contra,* Hazard v. Hazard, 197 Ill. App. 612 (where petition shows marriage was not legal). See Blankenmeister v. Blankenmeister, 106 Mo. App. 390, 80 S. W. 706; Knott v. Knott (N. J. Ch., 1902), 51 A. 15 (no alimony where no marriage ever existed); Zarch v. Zarch, 125 N. Y. S. 139, 140 App. Div. 900 (no alimony where in no need of present support); Taylor v. Taylor, 70 Ore. 510, 140 P. 999 (counsel fees but not support allowed).

32. Bickford v. Bickford, 74 N. H. 448, 69 A. 579; Tiedeman v. Tiedeman, 160 N. Y. S. 537; Taylor v. Taylor, 70 Ore. 510, 134 P. 1183.

33. Allen v. Superior Court of City and County of San Francisco, 133 Cal. 504, 65 P. 977.

34. Fuller v. Fuller, 33 Kan. 582, 7 P. 241; Sinclair v. Sinclair, 57 N. J. Eq. 222, 40 A. 679; Wabberson v. Wabberson, 57 N. Y. S. 405, 29 Civ. Proc. R. 227, 27 Misc. 125; Herron v. Herron, 59 N. Y. S. 861, 28 Misc. 323; Gore v. Gore, 89 N. Y. S. 902, 44 Misc. 323, 92 N. Y. S. 634, 103 App. Div. 74; Sanford v. Sanford, 94 N. Y. S. 1096, 35 Civ. Proc. R. 65; Arey v. Arey, 22 Wash. 261, 60 P. 724.

35. Hutchinson v. Hutchinson, 196 Ill. 432, 63 N. E. 1023, affg. 96 Ill. App. 52 (common-law marriage); Hilton v. Roylance, 25 Utah, 129, 69 P. 660, 58 L. R. A. 723, 95 Am. St. R. 821.

§ 1168. Actions to Validate Marriages.

Actions may be brought to validate disputed marriages in some States by statute.[36]

36. Littlefield v. Littlefield, 174 Mass. 216, 54 N. E. 531 (court is not bound to believe plaintiff's testimony although uncontradicted); Herrmann v. Hermann, 98 N. Y. S. 655, 112 App. App. Div. 891.

Where action is brought to confirm marriage of epileptic and it appears that such marriages are contrary to public policy the action should not merely be dismissed but the marriage should be annulled. Kitzman v. Kitzman, 167 Wis. 308, 166 N. W. 789.

CHAPTER XII.

COMMON-LAW MARRIAGES.

SECTION 1169. Words of Present Consent, or of Future Consent, etc.
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§ 1169. Words of Present Consent, or of Future Consent, etc.

To constitute a marriage, then, where there are no civil requirements — or, in other words, to constitute an informal marriage — words clearly expressing mutual consent are sufficient without other solemnities. Two forms of consent are mentioned in the books: the one, consent *per verba de præsenti,* with or without consummation; the other, consent *per verba de futuro,* followed by consummation.[37] Some writers have added a third form of consent — by habit and repute; but this is, very clearly, nothing more than evidence of consummated marriage amounting to a pre-

37. Swinb. Spousals, 2d ed., 8; 2 Burn Ec. Law, Phillim ed., 455e; Lord Cottenham, in Stewart v. Menzies, 2 Rob. Ap. Cas. 547.

sumption conclusive enough for the purpose at hand.[38] So, too, there is reason to suppose that the marriage *per verba de futuro* is of the same sort as the former; marriage *per verba de præsenti* constituting the only real marriage promise, while consummation following *de futuro* words of promise raises a legal presumption, not probably conclusive, that words *de præsenti* afterwards passed between the parties. The copula is no part of the marriage; it only serves to some extent as evidence of marriage.[39] *Consensus, non concubitus,* is the maxim of the civil, ecclesiastical, and common law alike.[40]

Informal celebration constitutes marriage as known to natural and public law. The English canon law as it stood previous to the Council of Trent, the law of Scotland, the law of some of the United States, and perhaps the common law of England, all dispense with the ceremonial observances of formal marriage.[41]

In this country a common-law marriage may appear in either of two ways, either by a present agreement of marriage,[42] even in

38. Lord Selborne, in the recent case of De Thoren v. Attorney-General, 1 H. L. App. 686, confirms this view. See also Breadalbane's Case, L. R. 1 H. L. Sc. 182.

39. Port v. Port, 70 Ill. 484; Jackson v. Winne, 7 Wend. 47; Dumaresly v. Fishly, 3 A. K. Marsh. 368, 372; Peck v. Peck, 12 R. I. 485.

40. Dalrymple v. Dalrymple, 2 Hag. Con. 54; 4 Eng. Ec. 485, 489.

41. Informal marriage has been recognized to a greater or less extent in the United States. *Post,* § 1183, Dickerson v. Brown, 49 Miss. 357; Hutchins v. Kimmell, 31 Mich. 126; Port v. Port, 70 Ill. 484; Lewis v. Ames, 44 Tex. 319; Dyer v. Brannock, 66 Mo. 391; Campbell v. Gullatt, 43 Ala. 57; Askew v. Dupree, 30 Ga. 173. But Maryland repudiates the doctrine of informal marriages: Denison v. Denison, 35 Md. 361, as, by force of statute or otherwise, do certain other States. Estill v. Rogers, 1 Bush, 62; Holmes v. Holmes, 1 Abb. (U. S.) 525; Robertson v. State, 42 Ala. 509; State v. Miller, 23 Minn. 352; Commonwealth v. Munson, 127 Mass. 459; State v. Hodgskins, 19 Me. 155.

42. Sprung v. Morton, 182 F. 330; Herd v. Herd, 69 So. 885, L. R. A. 1916B, 1243; *In re* Ruffino's Estate, 116 Cal. 304, 48 P. 127; Travers v. Reinhardt, 25 App. D. C. 567; Wynne v. State, 86 S. E. 823; Hutchinson v. Hutchinson, 196 Ill. 432, 63 N. E. 1023; *In re* Wittick's Estate, 164 Ia. 485, 145 N. W. 913; Smith v. Fuller (Ia.), 108 N. W. 765; Pegg v. Pegg, 138 Ia. 572, 115 N. W. 1027; Shorten v. Judd, 60 Kan. 73, 55 P. 286; Topper v. Perry, 197 Mo. 531, 95 S. W. 203, 114 Am. St. R. 777; Parker v.

the absence of witnesses,[43] or by an agreement to marry in the future followed by cohabitation.[44-45]

§ 1170. Form of Agreement.

Words of present promise, in order to constitute an informal marriage, must contemplate a present, not a future, assumption of the status. And herein lies a difficulty: that of discriminating between actual marriage and what we now commonly term an engagement. If the agreement be by words of present promise — as if the parties should say, "We agree to be henceforth man and wife" — the marriage is perfect. The form of expression is not material. The contract may be expressed in any form of words,[46] or may be implied,[47] and marriages have been upheld by joint

De Bernardi (Nev.), 164 P. 645; Atlantic City R. Co. v. Goodin, 62 N. J. Law, 394, 42 A. 333, 45 L. R. A. 671, 72 Am. St. R. 652; State v. Thompson, 76 N. J. Law, 197, 68 A. 1068; Umbenhower v. Labus, 97 N. E. 832, 85 Ohio St. 238; Swartz v. State, 13 Ohio Cir. Ct. R. 62, 7 Ohio Dec. 43; Commonwealth v. Haylow, 17 Pa. Super. Ct. 541; Fryer v. Fryer (S. C. 1832), Rich. Eq. Cas. 85; Becker v. Becker, 153 Wis. 226, 140 N. W. 1082. See *In re* Svenden's Estate, 37 S. D. 353, 158 N. W. 410 (present contract alone is insufficient).

43. People v. Spencer (Mich.), 165 N. W. 921.

A present agreement between competent persons to take each other for husband and wife constitutes a valid "marriage," though there be no witnesses. Dietrich v. Dietrich, 112 N. Y. S. 968, 128 App. Div. 564 (no witnesses).

A mutual agreement entered into in good faith between competent parties to contract the relation of husband and wife, followed by cohabitation as such, constitutes a valid marriage, even if the agreement was not made in the presence of witnesses. Umbenhour v. Umbenhour, 31 Ohio Cir. Ct. R. 317.

44-45. *In re* Maher's Estate, 204 Ill. 25, 68 N. E. 159.

An existing agreement to marry at a future day conclusively negatives the claim of a marriage *per verba de praesenti.* Sorensen v. Sorensen, 68 Neb. 483, 100 N. W. 930, 103 N. W. 455; Bargna v. Bargna (Tex. Civ. App. 1910), 127 S. W. 1156.

46. The contract requisite to the creation of the marriage relation need not be expressed in any special manner, or by any prescribed form of words, but may be sufficiently evidenced by any clear and unambiguous language or conduct. Reynoldson v. Reynoldson, 96 Neb. 270, 147 N. W. 844.

47. Adger v. Ackerman, 52 C. C. A. 568, 115 F. 124; Tedder v. Tedder, 108 S. C. 271, 94 S. E. 19. See Me-

declaration without further ceremony.[48] And Swinburne says that though the words should not of themselves conclude matrimony, yet the marriage would be good if it appeared that such was the intent.[49] The proposal of one must be actually accepted by the other; yet such acceptance may be indicated by acts, such as a nod or courtesy. The mutual consent may be expressed orally or in writing.[50] Written promises are of course unnecessary; though the reported cases show frequently letters or other writings interchanged, from which the intent was gathered. And in the celebrated Scotch case of *Dalrymple* v. *Dalrymple* a marriage promise was established from the successive united acknowledgments of the parties as man and wife, the writings having been preserved by the lady and produced by her at the trial. In this case the principle was sustained, that words importing secrecy or alluding to some future act or public acknowledgment, when superadded to words of present promise, do not invalidate the agreement.[51]

§ 1171. Mutual Consent Required.

It is to be premised, however, by way of enlarging upon the idea of perfect and imperfect consent suggested under the last head, that some form of marriage promise, some ceremony, however slight, has always been deemed essential to the validity of marriage. The common language of the books is, that, in the absence of civil regulations to the contrary, marriage is a contract, and nothing but mutual consent is required. And the old maxim of

Kenna v. McKenna, 180 Ill. 577, 54 N. E. 641, 73 Ill. App. 64 (promise not shown by cohabitation relying on statement of man that they were married).

48. *In re* Biersack, 159 N. Y. S. 519, 96 Misc. 161.

49. Swinb. Spousals, 2d ed., 87.

50. See Sapp v. Newsom, 27 Tex. 537, where marriage by means of mutually executing a bond or contract is sustained under the old law, which was of Spanish origin. But cf. State v. Miller, 23 Minn. 352.

51. Dalrymple v. Dalrymple, 2 Hag. Con. 54; 4 Eng. Ec. 485; McInnes v. More, Ferg. Consist. Law Rep. 33; Hoggan v. Cragie, Maclean & Rob. 942.

the Roman law is quoted to support this view: *Nuptias non concubitus, sed consensus facit.*[52] But is there not an ambiguity in the use of such language? For it is material to ask whether *consensus* or *consent* is used in the sense of simple volition or an expression of volition. We maintain that the latter is the correct legal view; and that it should be said that the law requires in such cases *a simple expression of mutual consent,* and no more. For the very definition of marriage implies that there should be not only the consenting mind, but an expression of the consenting mind, by words or signs, which expression in proper form constitutes in fact the marriage agreement. It is in this sense that we shall apply the terms *formal* and *informal* to marriage in the following sections.

§ 1172. Conditional Agreement.

More uncertainty arises in matrimonial contracts where a condition inconsistent with marriage is superadded; as if parties should agree to live together as man and wife for ten years; but *bona fide* intent may be fairly presumed where there are no special circumstances to throw light upon the conduct of the parties,[53] but a limited agreement is insufficient.[54]

§ 1173. Matrimonial Intent Necessary.

Informal marriage is to be sustained on the theory that an institution of such fundamental importance to our race ought to be good, independently of, and prior to, the formal requirements

52. See 2 Kent Com. 86, 87; Co. Litt. 33a.

53. See 1 Bish. Mar. & Div., 5th ed., §§ 245-250; Currie v. Turnbull, Hume, 373; 1 Fras. Dom. Rel. 154. See Hamilton v. Hamilton, 9 Cl. & F. 327; Hantz v. Sealy, 6 Binn. 405; Robertson v. Cowdry, 2 West. Law Jour. 191; and in Bish. *supra.* Bissell v. Bissel, 55 Barb. 325, shows an interesting state of facts, upon which it was decided that the marriage was valid.

54. Clancy v. Clancy, 66 Mich. 202, 33 N. W. 889 (leaving each party free to deal with property as if sole); Schwingle v. Keifer, 153 S. W. 1132, affg. judg. (Civ. App.), 135 S. W. 194 (agreement to live together only so long as both parties so desired).

which human government imposes at an advanced stage of society. But, as we shall see, the marriage acts now in force in England and many of the United States render certain solemnities, religious or secular, indispensable. Most of the continuous decisions relating to informal marriages are therefore to be found in the Scotch reports, where the general doctrine has been pretty fully discussed. And the great, the almost insuperable, difficulty which presents itself at the outset in such cases is thus clearly indicated by Lord Stowell in *Lindo* v. *Belisario:* "A marriage is not every carnal commerce; nor would it be so even in the law of nature. A mere carnal commerce, without the intention of cohabitation and bringing up of children, would not constitute marriage under any supposition. But when two persons agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation — that, in a state of nature, would be a marriage; and, in the absence of all civil and religious institutions, might safely be presumed to be, as it is property called, *a marriage in the sight of God.*" [55] Did parties therefore coming thus together mean fornication or did they mean marriage?

Here it is seen that there should not only be words of promise, but that they should be uttered with matrimonial intent. To ascertain the purpose of the parties in each case, the courts will look at all the circumstances, and even admit parol evidence to contradict the terms of a written contract; in this respect modifying the ordinary rules of evidence. For writings of matrimonial acknowledgment may have been interchanged as a blind or cover for some scheme well understood between the parties.[56] If, too, a woman, in surrendering her person to a man, is conscious that she is committing an act of fornication instead of consummating such a marriage, the copula cannot, for her sake, be connected with any previous words of promise so as to constitute a marriage.[57]

55. 1 Hag. Con. 216; 4 Eng. Ec. 367, 374. See 2 Kent Com. 86 and n.; 1 Fras. Dom. Rel. 149, 184, 187, 212.

56. Dalrymple v. Dalrymple, 2 Hag. Con. 54, 105; 4 Eng. Ec. 485, 508, 509.

57. Port v. Port, 70 Ill. 484.

Disbelief in ceremonials, or conscientious scruples, may be alleged in support of an informal marriage, by way of preference, where such latter marriage is held lawful, and the parties mutually contracted with the view of a lawful union.[58]

A present promise followed by cohabitation will effect a common-law marriage regardless of what the parties consider the legal effect of their acts to be.[59]

§ 1174. Per Verba de Praesenti.

It is a curious thing that after many American courts had been committed to the view of the common law that a marriage *per verba de præsenti* is valid, the highest court of England in the year 1844 decided against the existence of any such rule in that country.[60]

Where the statute law declares marriage a civil contract, although the duties and obligations arising from such contract and the status thereby created are fixed by law, there are many precedents for the rule that in the absence of statute expressly declaring such marriage invalid an informal contract of marriage, one made between competent parties without the legal ceremonies, and in the absence of the clergyman or civil officer, is, when consummated by cohabitation, valid and binding upon the parties.[61]

An interesting Scotch case illustrates the painful uncertainty which hangs about these informal marriages. A baronet of forty, and a bachelor, whose dissolute habits were notorious, had somewhat intimate relations with the family of a man who made fish-tackles. Entertained at the latter's house, on a birthday occasion, with a champagne supper, after which allusion was made by the host to the bad name he was getting with having the baronet so

58. See Bissell v. Bissell, 55 Barb. 325. *Aliter*, where statutes positively require a ceremonial marriage. See *post*, § 1189, as to formal marriage.

59. Tartt v. Negus, 127 Ala. 301, 28 So. 713.

60. Reg. v. Millis, 10 Clark & F. 534; Beamish v. Beamish, 9 H. L. Cas. 274.

61. Becker v. Becker, 153 Wis. 226, 140 N. W. 1082, L. R. A. 1915E, 56.

much among his daughters, the titled guest offered to shut people's mouths; he was poor and could not marry now, he said, but would marry after Scotch fashion. Then, kneeling before one of the daughters, a damsel of sixteen, he took a ring from his pocket, placed it upon her third finger, and said to her, "Maggie, you are my wife before Heaven, so help me, O God!" and the two kissed each other. The daughter said, "Oh, Major!" and put her arms around his neck. The baronet and the daughter were then "bedded" according to the old Scotch fashion. They lived together for some weeks after this celebration, and met at various times, but there appears to have been no continuous cohabitation. In about thirteen months Maggie had a boy, whom she registered as illegitimate; and some eighteen months later still, the baronet died. The parties to this hasty and apparently unpremeditated union had not, meantime, represented themselves as husband and wife; and as for the baronet, he denied to others that such relation existed, until, when lying at the point of death in delirium tremens, he seemed doubtfully to admit it. Now, here was an informal marriage, with words of suitable import, solemn and precise, followed by consummation. Supposing this ceremony to have been with marriage intention, there was no reason for disputing its validity; nor, indeed, on the girl's behalf, provided she took all in seriousness, even though the baronet himself jested. To be sure, he might have been maudlin at the moment, on which point, however, the case did not turn. The British House of Lords reversed the decision of the Scotch Court of Sessions, mainly upon circumstantial proof that both parties, by behavior subsequent to the ceremony, repudiated its force, and that neither, in fact, had been in earnest. The present issue involved the inheritance of the baronet's estate at some lapse from his death. Both parents of the girl were now dead: the baronet had begotten illegitimate offspring during his life elsewhere; and instead of asserting upon his death, as she might, that this boy was his lawful

child, Maggie had at first claimed only a bastard's support for him.[62]

§ 1175. Per Verba de Futuro.

Marriage by words of future promise is consummated when two persons agree to marry at some future period and afterwards actually do cohabit. The foundation of this doctrine is the presumption that the parties meant right rather than wrong, and hence that copulation was permitted on the faith of the marriage promise. But in this class of cases it is requisite that the promise *de futuro* should be absolute and mutual and in good faith. Mere courtship does not suffice, though followed by carnal intercourse,[63] and an agreement to live together as husband and wife is not sufficient unless acted upon by cohabitation.[64] Nor in general do words of promise with immoral conditions annexed. It is admitted that no familiarities short of the *copula* will convert such loose espousals into matrimony.[65] It is not clear whether cohabitation after *verba de futuro* raises ever a conclusive presumption of marriage at law or not: unquestionably the more reasonable doctrine, however, is that it does not, and that the intent of the parties may be shown as in other cases.[66] But innocence will be

62. Steuart v. Robertson, L. R. 2 H. L. Sc. 494.

63. Reid v. Laing, 1 Shaw App. Cas. 440; Morrison v. Dobson, 8 Scotch Sess. 347, cited in 1 Bish., § 253; Breadalbane's Case, L. R. 1 H. L. Sc. 182; Stewart v. Menzies, 2 Rob. App. Cas. 547, 591; 1 Fras. Dom. Rel. 188; Reg. v. Millis, 10 Cl. & F. 534, 780; Peck v. Peck, 12 R. I. 485; Beverson's Estate, 47 Cal. 621; Dumarsely v. Fishly, 3 A. K. Marsh. 368; 1 Bish. Mar. & Div., 5th ed., §§ 253-265, and other cases cited; Port v. Port, 70 Ill. 484; § — *post*.

64. Hawkins v. Hawkins, 142 Ala. 571, 38 So. 640, 110 Am. St. R. 53; McKenna v. McKenna, 180 Ill. 577, 54 N. E. 641, 73 Ill. App. 64; Marks v. Marks, 108 Ill. App. 371; Pegg v. Pegg, 138 Ia. 572, 115 N. W. 1027; Lorimer v. Lorimer, 124 Mich. 631, 83 N. W. 609, 7 Det. Leg. N. 367; Sorensen v. Sorensen, 68 Neb. 483, 100 930, 103 N. W. 455, 98 N. W. 837; Grigsby v. Reib (Tex. Civ. App. 1911), 139 S. W. 1027; 153 S. W. 1124; Riddle v. Riddle, 26 Utah, 268, 72 P. 1081.

65. 1 Bish., § 253.

66. See chapter *post*, on Breach of Promise. Seduction under breach of

inferred, if possible, rather than guilt.[67] In New York this doctrine of marriage by words *de futuro* is utterly repudiated, and in other States it is maintained quite broadly that all informal marriages were unknown to the English common law.[68] This last has been long a mooted point in the courts, and will ever remain so; but whatever may have been the historical fact, certain it is that the necessity for a more formal observance of marriage has been almost universally recognized; and the very words, "marriage in the sight of God," so familiar to the readers of the Scotch matrimonial law, not only import the peculiar embarrassments which attend the justification of such loosely contracted alliances before the world, but attest the solemn character of this institution.[69]

§ 1176. Intercourse After Betrothal.

Hence, we may observe, generally, that a betrothal followed by copulation does not make this informal marriage a legal one, when the parties looked forward to a formal marriage ceremony, and did not agree to become husband and wife without it;[70] and the

promise does not constitute a marriage. See, too, Morrison v. Dobson, 8 Scotch Sess. 347.

67. See Cheney v. Arnold, 15 N. Y. 345; Duncan v. Duncan, 10 Ohio St. 181; Reg. v. Millis, 10 Cl. & F. 534; Swinb. Spousals, 2d ed., 225, 226; Robertson v. State, 42 Ala. 509.

68. Cheney v. Arnold, 15 N. Y. 345; Bissell v. Bissell, 55 Barb. 325. And see Denison v. Denison, 35 Md. 361; *post*, § 1183, notes; Holmes v. Holmes, 1 Abb. (U. S.) 525; Duncan v. Duncan, 10 Ohio St. 181; Port v. Port, 70 Ill. 484. The opinion of Lord Stowell in the case of Dalrymple v. Dalrymple, to which we have alluded, is an admirable exposition of the law of informal marriages. It is a masterpiece of judicial eloquence and careful research.

69. For a case arising on an indictment against a man for cohabiting with a woman without formal marriage, but under a special contract for a life-union and joint accumulation of property and care of children, see State v. Miller, 23 Minn. 352. And see Commonwealth v. Munson, 127 Mass. 459. See further as to Presumptions of Marriage, *post*, § 1238.

70. Peck v. Peck, 12 R. I. 485; Beverson's Estate, 47 Cal. 621.

mere fact that parties were living together and intended some time to marry is not enough to show a common-law marriage.[71]

§ 1177. Public Cohabitation Necessary.

There is much conflict in the decisions whether public cohabitation is essential in this country for a common-law marriage, but it seems to be the general view that to constitute a marriage *per verba de præsenti* cohabitation subsequently is necessary, just the same as in case of a marriage *per verba de futuro*.[72]

Marriage is more than a contract: it is a status created by mutual consent of one man and one woman. The only difference between a formal marriage under license and a common-law marriage is in the method of expressing consent. The cohabitation must be professedly as husband and wife, and public, so that by their conduct towards each other they may be known as husband and wife. To allow a private agreement to operate as a common-law marriage would open the door to fraud of all kinds and make the estates of wealthy men the prey of the adventuress.

So where a man and woman in her room in a house which she kept as a house of assignation agreed to be husband and wife, and had intercourse together, there is no marriage where they never lived together publicly as man and wife, and she never took his name till after his death and continued in the same business as before.[73]

At common law a marriage required no particular ceremony,[74]

71. Nelson v. State (Tex. Cr. App.), 206 S. W. 361.

72. Herd v. Herd (Ala.), 69 So. 885, L. R. A. 1916B, 1243.

73. Grigsby v. Reib, 105 Tex. 597, 153 S. W. 1124, L. R. A. 1915E, 1.

74. White v. Hill, 176 Ala. 480, 58 Sc. 444; Klipfel's Estate v. Klipfel, 41 Colo. 40, 92 P. 26; Herald v. Moker, 257 Ill. 27, 100 N. E. 277; Heymann v. Heymann, 218 Ill. 636, 75 N. E. 1079; Porter v. United States, 7 Ind. T. 616, 104 S. W. 855; *In re* Boyington's Estate, 157 Ia. 467, 137 N. W. 949; Howard v. Kelly, 111 Miss. 285, 71 So. 391; Rundle v. Pegram, 49 Miss. 751; State v. Burkrey, 183 S. W. 328 (not a common-law marriage in absence of general public recognition of relation); State v.

but enough had to be done to make it a contract, and the parties must hold themselves out to the public as such and cohabit as man and wife.[74a]

In some jurisdictions, however, it is held that it is not necessary to the validity of a marriage in the present tense that the contract

Cooper, 103 Mo. 266, 15 S. W. 327; *In re* Wells' Estate, 194 N. Y. 548, 87 N. E. 1129; *In re* Love's Estate, 42 Okla. 478, 142 P. 305; Bothwell v. Way, 44 Okla. 555, 145 P. 350; Berger v. Kirby, 153 S. W. 1130, affg. judg. (Civ. App.), 135 S. W. 1122; Whitaker v. Shenault (Tex. Civ. App.), 172 S. W. 202; Burnett v. Burnett (Tex. Civ. App., 1904), 83 S. W. 238; Schwingle v. Keifer (Tex. Civ. App., 1911), 135 S. W. 194 (cohabitation alone insufficient); Melton v. State (Tex. Civ. App.), 158 S. W. 550; Wofford v. State, 60 Tex. Cr. App. 624, 132 S. W. 929; Burks v. State, 50 Tex. Cr. R. 47, 94 S. W. 1040; see extended note on common-law marriages in L. R. A. 1915E, 56.

74a. Great Northern Ry. Co. v. Johnson (U. S. C. C. A. N. D.), 254 F. 683 (in Missouri); Davis v. Prior, 50 C. C. A. 579, 112 F. 274; Moore v. Heineke, 119 Ala. 627, 24 So. 374; McDaniels v. McDaniels, 5 Alaska, 107; Hutchinson v. Hutchinson, 196 Ill. 432, 63 N. E. 1023, 96 Ill. App. 52; Alden v. Church, 106 Ill. App. 347; Love v. Love (Ia.), 171 N. W. 257; Matney v. Linn, 59 Kan. 613, 54 P. 668; Renfrow v. Renfrow, 60 Kan. 277, 56 P. 534, 72 Am. St. R. 350; Schuchart v. Schuchart, 61 Kan. 597, 60 P. 311, 50 L. R. A. 180; Severance v. Severance (Mich.), 163 N. W. 924; Flanagan v. Flanagan, 122 Mich. 386, 81 N. W. 258, 6 Det. Leg. N. 797; People v. Spencer (Mich.), 165 N. W. 921; Howard v. Kelly, 111 Miss. 285, 71 So. 391; State v. Hansbrough, 181 Mo. 348, 80 S. W. 900; Butterfield v. Ennis, 193 Mo. App. 638, 186 S. W. 1173; University of Michigan v. McGuckin, 62 Neb. 489, 87 N. W. 180, 57 L. R. A. 917, 64 Neb. 300, 89 N. W. 778, 57 L. R. A. 917; Eaton v. Eaton, 66 Neb. 676, 92 N. W. 995, 60 L. R. A. 605; Davidson v. Ream, 161 N. Y. S. 73, 97 Misc. 89 (although parties live together only a few days); Herz v. Herz, 69 N. Y. S. 478, 34 Misc. 125; Moller v. Sommer, 149 N. Y. S. 103, 86 Misc. 110, judg. affd. 150 N. Y. S. 1097 (without ceremony or witnesses); Hughes v. Kano (Okla.), 173 P. 447; Coleman v. James (Okla.), 169 P. 1064; Clarkson v. Washington, 38 Okla. 4, 131 P. 935 (Indians); Reaves v. Reaves, 15 Okla. 240, 82 P. 490, 2 L. R. A. 353; Grigsby v. Reib, 153 S. W. 1124, affg. judg. (Civ. App.), 139 S. W. 1027; Galveston H. & S. A. Ry. Co. v. Cody, 20 Tex. Civ. App. 520, 50 S. W. 135; Edmondson v. Johnson (Tex. Civ. App.), 207 S. W. 586; Jackson v. Banister, 47 Tex. Civ. App. 317, 105 S. W. 66; Hilton v. Roylance, 25 Utah, 129, 69 P. 660, 58 L. R. A. 723, 95 Am. St. R. 821. See Edelstein v. Brown, 100 Tex. 403, 100 S. W. 129, 95 S. W. 1126 (although illicit relations had been sustained between the parties).

be followed by the parties holding themselves out as husband and wife, or that it be acted on by the parties living together openly as husband and wife.[75]

§ 1178. Character of Cohabitation.

No fixed or continuous period of time of cohabitation is necessary to constitute a common-law marriage,[76] but cohabitation for a short time induced by fraud without actual holding out to the community is not enough.[77]

On the issue of the existence of a common-law marriage the character of cohabitation between the man and woman is material, and the evidence which tended to show the character of the community in which she lived and her own character for virtue were relevant to interpret the visits of the man and his association with the woman.[78]

§ 1179. Cohabitation After Removal of Impediment.

Where the parties in the beginning intend and desire a valid marriage, but an impediment exists and they continue in the relation of husband and wife after the removal of the impediment, this continuation may be upheld as a common-law marriage.[79] So it has been said that where a legal impediment exists to a mar-

75. Green v. Green (Fla.), 80 So. 739; Love v. Love (Ia.), 171 N. W. 257; *In re* Hulett's Estate, 66 Minn. 327, 69 N. W. 31, 61 Am. St. R. 419; Davis v. Stouffer, 132 Mo. App. 555, 112 S. W. 282; Hilton v. Roylance, 25 Utah, 129, 69 P. 660, 58 L. R. A. 723, 95 Am. St. R. 821.

76. Walton v. Walton (Tex. Civ. App.), 203 S. W. 133.

77. People v. Adams, 17 Det. Leg. N. 558, 127 N. W. 354; Lee v. State, 44 Tex. Cr. R. 354, 72 S. W. 1005 (sham marriage kept secret insufficient).

78. Berger v. Kirby, 105 Tex. 611, 153 S. W. 1130, 51 L. R. A. (N. S.) 182.

79. Land v. Land, 206 Ill. 288, 68 N. E. 1109, 99 Am. St. R. 171, 108 Ill. App. 131. See extended note on common-law marriages and the effect of the removal of the impediment in L. R. A. 1915E, 87.

riage between persons living in licentious intercourse, as the impediment sinks the status rises.[80]

§ 1180. Who May Make.

One already married cannot make a valid common-law marriage.[81]

§ 1181. Relations Illicit in Inception.

A union once originating between man and woman, purely illicit in its character, and voluntarily so, there must appear some formal and explicit agreement between the parties thereto, or a marriage ceremony, or some open and visible change in their habits and relations, pointing to honest intentions, before their alliance can be regarded as converted into either a formal or an informal marriage,[82] as although the relations between them were illicit in the begnning still a common-law marriage may later occur between them.[83]

So a common-law marriage may be sustained notwithstanding previous illicit relations between the parties where the parties agree to live together as man and wife and live together as such for seven years and are known to their friends and neighbors as married during that period. The mere fact that the previous relations between the parties were illicit does not prevent a common-law marriage, as it cannot be contended that a man and woman living together in illicit relations cannot subsequently

80. De Thoren v. Attorney-General, 1 H. L. App. 686.

81. Gaines v. Fidelity & Casualty Co. of New York, 97 N. Y. S. 836, 111 App. Div. 386.

82. See Floyd v. Calvert, 53 Miss. 37; Duncan v. Duncan, 10 Ohio St. 181; Hunt's Appeal, 86 Pa. St. 294; Williams v. Williams, 46 Wis. 464; Barnum v. Barnum, 42 Md. 251. Perhaps the Scotch law is less emphatic on this point. It is stated in Breadalbane's Case, L. R. 1 H. L. Sc. 182, that a connection beginning as adulterous may, on ceasing to be so, become matrimonial by consent and evidenced by habit and repute, without a public act.

83. Schaffer v. Krestovnikow (N. J.), 105 A. 239; Swartz v. State, 13 Ohio Cir. Ct. R. 62, 7 Ohio Dec. 43.

marry. In the face of long-continued cohabitation as man and wife the presumption of the continuance of an illicit relation gives way to a superior presumption of compliance with the law.[84]

Nor is the issue between informal marriage and illicit intercourse to be concluded by the conduct of the pair towards society. They may, for convenience or decency's sake, hold themselves out to third persons as man and wife, while yet sustaining at law, and intentionally, a purely meretricious relation.[85]

And yet a proper regard for the real intention of the cohabiting pair encourages often the presumption of innocence and good faith, even where the relation assumed was an illegal one. Supposing two persons to have made an informal marriage, in the mistaken belief that the former spouse of one of them was already dead, or that some sentence of divorce left them, in like manner, free to unite. This case should be distinguished from that of some original understanding for a mere carnal commerce. And if the impediment becomes removed in the course of their cohabitation under such circumstances, and the pair live continuously together as man and wife, no new ceremony, agreement, or visible change in their relation would probably be deemed requisite to establish matrimonial consent subsequent to the removal of the impediment; for here the original intention continues, but in the case of carnal commerce necessarily changes, in order that an honest relation may be presumed.[86]

§ 1182. After Divorce.

The remarriage of a divorced person in violation of a prohibition on remarriage is not a valid common-law marriage,[87] but

84. Knecht v. Kneent (Pa.), 104 A. 1918.

85. Howe's Estate (Myrick's Probate, 100.

86. See De Thoren v. Attorney-General, 1 H. L. App. 686, where the impediment followed divorce; here it was held, in conformity with the rule above stated, that matrimonial consent after the marriage impediment was removed might be presumed.

87. Wilson v. Cook, 256 Ill. 460, 100 N. E. 222; Lanham v. Lanham, 136 Wis. 360, 117 N. W. 787, 17 L. R. A. (N. S.) 804. See *post*, § 1917.

divorced persons may contract a common-law marriage between themselves.[88]

§ 1183. In What States Valid.

A common-law marriage is still valid in some States,[89] but is abrogated in other States.[90]

§ 1184. Effect of Statutes Requiring Ceremony.

Out of consideration for what may be termed the public, or natural and theoretical law of marriage, many American courts have, to a very liberal extent and beyond all stress of necessity, upheld the informal marriage against even legislative provisions for a formal cerebration. Marriage being a matter of common right, it is held by the highest tribunal for harmonizing the rule of States, that, unless the local statute which prescribes regulations for the formal marriage ceremony positively directs that marriages not complying with its provisions shall be deemed void, the in-

88. *In re* Matteote's Estate, 59 Colo. 566, 151 P. 448.

89. Great Northern Ry. Co. v. Johnson (U. S. C. C. A. N. D.), 254 F. 683 (Minn.); Smith v. People (Colo.); 170 P. 959 (mutual assent essential); Meehan v. Edward Valve & Mfg. Co. (Ind. App.), 117 N. E. 265; Warren v. Warren, 66 Fla. 138, 63 So. 726; People v. Spencer (Mich.), 165 N. W. 921; Ziegler v. P. Cassidy's Sons, 220 N. Y. 98, 115 N. E. 471, 155 N. Y. S. 1151, 171 App. Div. 959 (prior to 1901); *In re* Hinman, 131 N. Y. S. 861, 147 App. Div. 452.

In New York common-law marriages have been recognized except between 1902 and 1908. *In re* Spondre, 162 N. Y. S. 943, 98 Misc. 524; *In re* Smith's Estate, 133 N. Y. S. 730, 74 Misc. 11; *In re* Sanders' Estate (Okla.), 168 P. 197 (in Okla.); Thomas v. James (Okla.), 171 P. 855; Palmer v. Cully, 153 P. 154; Draughn v. State (Okla. Cr. App.), 158 P. 890; *Ex parte* Romans, 78 S. C. 210, 58 S. E. 614 (negroes); *In re* Romans' Estate, *Id.;* Walton v. Walton (Tex. Civ. App.), 191 S. W. 188; Harlan v. Harlan (Tex. Civ. App. 1910), 125 S. W. 950; Nye v. State, 179 S. W. 100.

A statement of the States where common-law marriages are still upheld will be found in L. R. A. 1915E, 19, 20, and in 32 Harvard Law Review, 848.

90. Furth v. Furth, 97 Ark. 272, 133 S. W. 1037 (common-law marriage never adopted in State); Johnson's Heirs v. Raphael, 117 La. 967, 42 So. 470; *In re* Raphael, *Id.;* Schumacher v. Great Northern Ry. Co. 23 N. D. 231, 136 N. W. 85.

formal marriage by words of present promise must be pronounced valid, notwithstanding statutory directions have been disregarded.[91]

At common law a marriage was valid made merely by consent of the parties cohabiting together as husband and wife, and such marriages are still good in this country unless expressly declared void by statute. Statutes providing simply what ceremony shall be used and what officers shall solemnize a marriage are directory merely and do not render void a common-law marriage.[92]

So statutes requiring a marriage license before a marriage may be entered into, and defining marriage as a civil contract, are directory merely, and do not invalidate a marriage entered into without these formalities. The common-law marriage entered into in good faith will be upheld except where the statute expressly makes it void.[93] So statutory requirements as to marriage may be held directory so as to leave common-law marriages valid,[94] and such marriage will be upheld although the parties do not comply with a statute requiring certain formality where the statute only makes failure to comply with it a crime.[95]

§ 1185. Effect of Statute Ratifying Common-Law Marriages.

An act declaring that all persons who are now living together as husband and wife shall be taken for all purposes as married applies only to those who accept each other as husband and wife.[96]

§ 1186. Effect of Invalid Ceremony.

A common-law marriage may arise in one State by parties liv-

91. Meister v. Moore, 96 U. S. 76, (citing this as the rule in Michigan); Hutchins v. Kimmell, 31 Mich. 128; Londonderry v. Chester, 2 N. H. 268.

92. Draughn v. State (Okla. Crim. Rep.), 158 P. 890, L. R. A. 1916F, 793.

93. *Re* Love, 42 Okla. 478, 142 P. 305, L. R. A. 1915E, 109.

94. Caras v. Hendrix, 62 Fla. 446, 57 So. 345; Reaves v. Reaves, 15 Okla. 240, 82 P. 490, 2 L. R. A. 353. See Kahn v. Kahn, 118 N. Y. S. 1116, 133 App. Div. 889 (failure to file contract of marriage).

95. Renfrow v. Renfrow, 60 Kan. 277, 56 P. 534, 72 Am. St. R. 350; Coad v. Coad, 87 Neb. 290, 127 N. W. 455.

96. Rundle v. Pegram, 49 Miss. 751;

ing there although the parties celebrated an invalid ceremonial marriage in another State.[97]

Where the parties went before a justice of the peace, who held a marriage ceremony in the usual form, but he was not qualified to celebrate a marriage, the marriage was void as a statutory marriage, and was also void as a common-law marriage, as there was no cohabitation after the ceremony, although the parties had had intercourse with each other before that time and there was subsequently a child born.[98]

§ 1187. Evidence.

On the question of the existence of a common-law marriage the woman cannot testify that she married the man, as this is a conclusion,[99] but the subsequent conduct of the parties may be inquired into to ascertain what the contract was.[1]

§ 1188. Presumptions; Mental Reservations.

In cases of doubt, the rule is to sustain the marriage as lawful and binding. If there has been continued intercourse between the parties, this presumption becomes of course still stronger. And if promises were exchanged while one acted in good faith and in earnest, the other is not permitted to plead a mental reservation.[2]

Haines v. Haines, 90 Miss. 100, 43 So. 465.

97. Davidson v. Ream, 164 N. Y. S. 1037, 178 App. Div. 362, 161 N. Y. S. 73, 97 Misc. 89.

98. Herd v. Herd (Ala.), 69 So. 885, L. R. A. 1916B, 1243.

99. Berger v. Kirby, 105 Tex. 611, 153 S. W. 1130, 51 L. R. A. (N. S.) 182.

1. Bey v. Bey, 83 N. J. Eq. 239, 90 A. 684.

2. *In re* Imboden's Estate, 111 Mo. App. 220, 86 S. W. 263. And see 1 Fras. Dom. Rel. 213; Lockyer v. Sinclair, 8 Scotch Sess. Cas. (N. S.) 582.

CHAPTER XIII.

FORMAL CELEBRATION.

SECTION 1189. English Law Requiring Ceremony.
1190. Religious Ceremony.
1191. Statutes Prescribing Forms Directory Only.
1192. Form of Assent.
1193. Mental Reservation.
1194. Presence of Third Person Necessary.
1195. Witnesses.
1196. Legalizing Defective Marriages; Legislative Marriages.
1197. Second Ceremony Between Same Parties.
1198. War Marriages.

§ 1189. English Law Requiring Ceremony.

All the learning of informal marriages, if there was ever much of it, was swept out of the English courts when formal religious celebration was prescribed by positive statute. Ceremonials had long been required by those canons upon which the ecclesiastical law was based. Lord Hardwicke's Act, passed in the reign of George II.,[3] is the most famous of these statutes. This act required all marriages to be solemnized in due form in a parish church or public chapel, with previous publication of the banns; and marriages not so solemnized were pronounced void, unless dispensation should be granted by special license. Some harsh provisions of this act were relaxed in the reign of George IV., but soon re-enacted.[4] More recent legislation permits of a civil ceremonial before a register, to satisfy such as may have conscientious scruples against marriage in church.[5] Such, too, is the general tenor of legislation in this country; the law justly regarding civil observances and public registration sufficient for its own purposes, while human nature clings to the religious ceremonial.[6]

3. 26 Geo. II., ch. 33 (1753).
4. 3 Geo. IV.; 4 Geo. IV., ch. 76.
5. See 6 & 7 Will. IV., ch. 85, & ch. 88; 7 Will. IV., and 1 Vict., ch. 22, and 3 & 4 Vict., ch. 92.
6. See 2 Kent Com. 88-90.

§ 1190. Religious Ceremony.

Either celebration before a clergyman or with the participation of some one of such civil officers as the statute may designate is therefore at the option of parties choosing at the present day to marry. This is the law of England and America. And the only controversies ever likely to occur in our courts would be where the language of the statutes in some particular State left it doubtful whether marriages celebrated informally were to be considered absolutely null. It is to be borne in mind that Lord Hardwicke's Act is of too recent a date to be considered as part of our common law. Was, then, marriage *in facie ecclesiæ* essential in England before the passage of this act? It is admitted that the religious marriage celebration was customary previous to the Reformation. It is further allowed that the church, centuries ago, created an impediment, now obsolete, called "precontract," the effect of which was that parties engaged to be married were bound by an indissoluble tie, so that either one could compel the other to submit at any time to the ceremonial marriage. But whether precontract rendered children legitimate, and carried dower, curtesy, and the other incidents of a valid marriage, is not clear. In 1844 the question, whether at the common law a marriage without religious ceremony was valid, went to the English House of Lords, and resulted in an equal division.[7] And, curiously enough, such was the fate of a similar case in this country before the highest tribunal in the land.[8] So that we may fairly consider the law on this point as forever unsettled.[9]

7. Reg. v. Millis,, 10 Cl. & F. 534.

8. Jewell v. Jewell, 1 How. (U. S.) 219.

9. See full discussion of this question, with authorities, in note to 2 Kent Com. 87; Cheney v. Arnold, 15 N. Y. 345. The American doctrine is, that the intervention of one *in holy orders* was not essential at common law. This is the view of Chancellor Kent, Judge Reeve, and Professor Greenleaf, as expressed in their respective text-books; also the general current of American decisions. Mr. Bishop confirms these conclusions while suggesting new reasons for such an American doctrine; as, for instance, that in these colonies the attendance of one in holy orders, and more especially of an ordained clergy-

Among most nations and in all ages has the celebration of marriage been attended with peculiar forms and ceremonies, which have partaken more or less of the religious character. Even the most barbarous tribes so treat it where they hold to the institution at all. The Greeks offered up a solemn sacrifice, and the bride was led in great pomp to her new home. In Rome, similar customs prevailed down to the time of Tiberius. Marriage, it is true, degenerated afterwards into a mere civil contract of the loosest description; parties being permitted to cohabit and separate with almost equal freedom.[10] The early Christians, there is reason to suppose, treated marriage as a civil contract; yielding, perhaps, to the prevailing Roman law. Yet the teachings of the New Testament and church discipline gave peculiar solemnity to the relation. And religious observances must have prevailed at an early date, for in process of time marriage became a sacrament. In England, centuries later, it needed only Lord Hardwicke's Act to apply statute law to a universal practice; for although, in the time of Cromwell, justices of the peace were permitted to perform the ceremony, popular usage by no means sanctioned the change. Informal marriages are uncommon even in Scotland, where the civil law prevails. In our own country it is not surprising that local jurisprudence should have exhibited some signs of reaction against ancient canon and kingly ordinance. Yet, even with us, the almost universal custom repudiates informal and civil observances; and, secured in the privilege of choosing prosaic and business-like methods of procedure, Christian America yields its testimony in favor of marriage *in facie ecclesiæ*.[11]

man of the established church, could not always be readily procured. See 1 Bish. Mar. & Div., 5th ed., §§ 279-282, and decisions collated; 2 Kent Com. 87; Reeve Dom. Rel. 195 *et seq.*; 2 Greenl. Ev., § 460.

But in several States the contrary is declared to be the common law. 1 Bish. *ib.* And statutory forms are declared requisite, and the doctrines of informal marriage denied more or less emphatically, as the foregoing pages have shown. *Supra*, § 1183, note.

10. Smith's Dict. Antiq. "Marriage;" *supra*, Part I.

11. See 2 Kent Com. 89, and authorities cited.

We do not mean to imply that mar-

The customs of particular religious sects may be used in celebrating marriage[12] but not to sanction bigamy[13] and there need not be a religious ceremony at all.[14]

§ 1191. Statutes Prescribing Forms Directory Only.

Statutes prescribing the forms of marriage are directory and a failure to comply with them does not render the marriage void unless the statute expressly so provides.[15] The main purpose of enforcing upon civilized and populous communities marriage rites appropriate to so solemn an institution being surely desirable, it will be readily conceded that English and American tribunals tend, in construing the marriage acts, to uphold every marriage, if possible, notwithstanding a non-compliance with the literal forms. And this is right; for while formal celebration is a shield to honest spouses and their posterity, rigor in the details of form, especially in inconvenient or trivial details, or those which it is incumbent rather upon third persons to respect, exposes them to new dangers. Thus, in construction of the English mandatory act, marriage celebrated by a clergyman in temporary quarters while the church was undergoing repairs is presumed to have been celebrated in a place duly licensed.[16]

riage is a sacrament, or that religious ceremonies are essential to its due observance. We are speaking only of the universal testimony as to the fitness of peculiar and in general religious observances. Judge Reeve, exhibiting his contempt for "Popish" practices, says: "There is nothing in the nature of a marriage contract that is more sacred than that of other contracts, that requires the interposition of a person in holy orders, or that it should be solemnized in church." Reeve Dom. Rel. 196. At the time he wrote, was not the practice prevailing in New England contrary to his theory, as it was before and as it remains still? And who has ever proposed in modern times to perform a business contract in church?

12. Hilton v. Roylance, 25 Utah, 129, 69 P. 660, 58 L. R. A. 723, 95 Am. St. R. 821.

13. Riddle v. Riddle, 26 Utah, 268, 72 P. 1081.

14. Feehley v. Feehley, 129 Md. 565, 99 A. 663.

15. Franklin v. Lee, 30 Ind. App. 31, 62 N. E. 78; Ferrie v. Public Administrator (N. Y. Sur. 1855), 3 Bradf. Sur. 151.

16. Queen v. Cresswell, 1 Q. B. D.

§ 1192. Form of Assent.

We may assume, on general principle, that a mutual assent to marry in the presence of such third person is essential to the formal ceremony, and that if such assent is refused by either party, or waived or omitted altogether, there is no valid ceremony of marriage; while, as to the form, by words or acts, expressive of the marriage consent of the pair, this is discretionary, and no set formality or ritual is needful.[17]

§ 1193. Mental Reservation.

No secret reservation of one of the parties can affect the validity of a proper marriage ceremony.[18]

§ 1194. Presence of Third Person Necessary.

On the other hand, our ceremonial statutes of marriage, which require fulfilment at all, must, in fundamental respects, at all events, be complied with. Thus, the essence of formal marriage seems to consist in the performance of the ceremony by or in the presence of a responsible third person. And hence, unless parties can take refuge in natural law and an informal marriage, they are not permitted to tie their own knot. Consistently with this view, and quite rationally, it has been insisted in Massachusetts that husband and wife cannot be permitted to solemnize their own marriage. And quite recently in that State, where a ceremony was performed solely by the man and woman, no third person taking part, no magistrate or minister being present, and neither party claiming to hold the tenets of Friends or Quakers, it was held that a valid marriage rite had not been constituted.[19]

446. And see Stillwood v. Tredger, 2 Phillim. 287.

17. Wood, V. C., in Harrod v. Harrod, 1 Kay & J. 4, observes that in England it has never been held, as to the ceremony itself, that repetition of the words of the marriage service is necessary.

18. Barker v. Barker, 151 N. Y. S. 811, 88 Misc. 300; Hilton v. Roylance, 25 Utah, 129, 69 P. 660, 58 L. R. A. 723, 95 Am. St. R. 821.

19. Commonwealth v. Munson, 127 Mass. 459. And see Milford v. Worcester, 7 Mass. 48. But in Beamish v. Beamish, 1 Jur. (N. S.), Part II.,

§ 1195. Witnesses.

Marriage before a large number of witnesses, such as cannot always be conveniently procured, is not to be readily insisted upon as indispensable under any statute.[20]

§ 1196. Legalizing Defective Marriages; Legislative Marriage.

Defective marriages have in some instances been legalized by statute; as where parties within the prohibited degrees of consanguinity or affinity have united. So with marriages before a person professing to be a clergyman or justice of the peace, but without actual authority. On principle, in fact, there seems no reason to doubt that any government, through its legislative branch, may unite a willing pair in matrimony, as well as pass general laws for that purpose.[21] But though legislative divorces are not unfrequent, a legislative marriage is something unknown, not to say uncalled for. And in this country, questions of fundamental constraint under a written constitution might arise, even where the cure only of a defective marriage was sought by the legislature; inasmuch as the intervening rights of third persons might thereby be prejudiced.

§ 1197. Second Ceremony Between Same Parties.

A second marriage ceremony between persons already married is of no effect if the first is legal but will be effective if the first is void.[22]

455, it was held in Ireland that a clergyman might marry himself. See 1 Bish., § 289.

20. See Rodebaugh v. Sanks, 2 Watts, 9.

21. Brunswick v. Litchfield, 2 Greenl. 28; Moore v. Whittaker, 2 Harring. 50; Goshen v. Richmond, 4 Allen, 458; 1 Bish. Mar. & Div., 5th ed., §§ 657-659. As to the effect of a Texas statute, which relaxed old requirements in legalizing an irregular marriage, see Rice v. Rice, 31 Tex. 174.

22. Landry v. Bellenger, 120 La. 962, 45 So. 956, 15 L. R. A. (N. S.) 463; Knapp v. State, 54 Tex. Cr. App. 633, 114 S. W. 836.

§ 1198. War Marriages.

During the war the so-called "war marriages" gave the courts and draft boards much trouble. Under the draft law of 1917 draft boards are directed to scrutinize marriages contracted since May 18, 1917, and classify men without reference thereto unless they prove affirmatively that the marriage was not contracted with a view to evade the draft. The finding of the draft boards are furthermore final and cannot be reversed by the courts.[23]

23. Boitano v. District Board, 250 Cal. 812.

CHAPTER XIV.

OFFICIAL SOLEMNIZING MARRIAGE.

SECTION 1199. Who May Celebrate.
1200. Breach of Law by Person Officiating.
1201. Celebration by One Without Authority.
1202. Marriage Not a Judicial Act.
1203. Official Not Consenting to Ceremony.
1204. Belief of Person Celebrating Marriage in Its Validity.
1205. Liability for Celebrating Prohibited Marriage.
1206. Fees.

§ 1199. Who May Celebrate.

Marriages may be commonly celebrated by a minister[24] or by others with the consent of the parties[25] and as marriage is a civil contract it is not indispensable that it be performed by a clergyman[26] and the power is permissive and not mandatory.[27]

§ 1200. Breach of Law by Person Officiating.

And where questions occur, as they do quite frequently, under penal statutes, which impose the exercise of discretion or of due formalities upon the minister or magistrate performing the ceremony, not only is such a person universally presumed to do rightly what he may be mulcted for doing wrongly, but his disregard of the penal prohibition will not invalidate the ceremony.[28] The

24. Norman v. Norman, 121 Cal. 620, 54 P. 143, 42 L. R. A. 343, 66 Am. St. R. 74 (not by sea captain on high seas); Ligonia v. Buxton, 2 Greenl. 102, 11 Am. Dec. 46 (minister of unincorporated association not qualified). See State v. Brown, 119 N. C. 825, 25 S. E. 820 (not a crime for one not a minister to act with consent of parties). See Weidenhoft v. Primm, 16 Wyo. 340, 94 P. 453.

25. State v. McKay, 122 Ia. 658, 98 N. W. 510.

26. Draughn v. State (Okla. Cr. App.), 158 P. 890.

27. Darrow v. Darrow (Ala.), 78 So. 383 (ordinary); Matthes v. Matthes, 198 Ill. App. 515 (justices of the peace); Douglas County v. Vinsonhaler, 82 Neb. 810, 118 N. W. 1058.

28. 1 Bish. Mar. & Div., 5th ed.,

several States treat the marrying functions and jurisdiction of both ministers of the gospel and civil magistrates with great liberality, rarely permitting a marriage to be disturbed upon any misapprehension in these respects.[29]

§ 1201. Celebration by One Without Authority.

A marriage celebrated by one without authority where the parties acted in good faith is valid[30] and marriages are not void merely because celebrated by one having no actual authority to do so,[31] but a celebration has been held void not performed before an authorized person.[32]

§ 1202. Marriage Not a Judicial Act.

The solemnization of a marriage is in no sense a judicial act even though performed by a judge and although performed in court no record should be made of it in the court records. It may be performed anywhere even though the clerk does not attend and at any time.[33]

§ 1203. Official Not Consenting to Ceremony.

The person officiating must take an active part and consent to the ceremony and it is not a valid marriage where the official declines to officiate and the parties go through the ceremony themselves in his presence.[34]

§§ 283, 287, and cases cited; Parton v. Hervey, 1 Gray, 119; State v. Robbins, 6 Ire. 23; Blackburn v. Crawfords, 3 Wall. 175; Pearson v. Howey, 6 Halst. 12. This is the rule, even though one marries minors without the required consent of parents. Parton v. Hervey, *supra*.

29. See 1 Bish., §§ 290, 291; People v. Calder, 30 Mich. 85. Questions of this character arise upon the interpretation of local statutes differently worded in different States.

30. Ross v. Sparks, 81 N. J. Eq. 117, 88 A. 384; decree affirmed (Err. & App.), 81 N. J. Eq. 211, 88 A. 385; Weatherall v. Weatherall, 63 Wash. 526, 115 P. 1078.

31. People v. Perriman, 72 Mich. 184, 40 N. W. 425. See *In re* Love's Estate, 42 Okla. 478, 142 P. 305 (clergyman not necessary).

32. Robinson v. Reed's Adm'r, 19 Ky. Law Rep. 1422, 43 S. W. 435.

33. City of St. Louis v. Sommers, 148 Mo. 398, 50 S. W. 102.

34. Milford v. Worcester, 7 Mass. 48.

§ 1204. Belief of Person Celebrating Marriage in Its Validity.

A marriage ceremony may be valid although the minister who performed it did not believe it was a marriage ceremony at all.[35] Thus where two Catholics had been granted a divorce which was not recognized by their church and they decided to remarry and a priest came in and read the marriage ceremony in the customary form with the use of the ring and the usual questions and answers, this is a valid marriage although the priest thought he was simply giving his blessing to their reunion, and that he could not remarry them as they had never been divorced in the view of the church.[36]

§ 1205. Liability for Celebrating Prohibited Marriage.

One may be guilty of solemnizing a marriage contrary to law although he told the parties that they could not lawfully marry[37] or although he was ignorant that the parties were under the legal age.[38] In this class of statutes, the minister or magistrate who has made himself amenable to the law cannot in general defend on the plea that he acted in good faith.[39]

One marrying a minor without the parent's consent may be still liable to the penalty though the husband may be thereby released by the provisions of a law releasing one from jail, who marries a woman seduced by him.[40] Where the statute makes it a crime to solemnize a marriage the one who procured the solemnization may be liable as an accessory.[41]

35. Pearce v. State, 97 Ark. 5, 132 S. W. 986.

36. Feehley v. Fechley, 129 Md. 565, 99 A. 663, L. R. A. 1917C, 1017.

37. Pearce v. State, 97 Ark. 5, 132 S. W. 986.

38. Territory v. Harwood, 15 N. M. 424, 110 P. 556.

39. 1 Bish., § 342; Sikes v. State, 13 Ark. 696. But he may show due prudence on his part for faithfully ascertaining the age of the parties before uniting them, and so exculpate himself. Gilbert v. Bone, 79 Ill. 341. Some statutes make knowledge on the part of minister or magistrate the essential ground of prosecution. Bonker v. People, 37 Mich. 4.

40. Craft v. Jachetti, 47 N. J. Law, 205.

41. Barclay v. Commonwealth, 116 Ky. 275, 76 S. W. 4, 25 Ky. Law Rep. 463.

§ 1206. Fees.

A justice of the peace requested to perform services not required by law and to go to a private house to perform a marriage ceremony may charge a fee in excess of that allowed by statute.[42]

42. Vogel v. Brown, 201 Mass. 261, 87 N. E. 686.

CHAPTER XV.

CONSENT OF PARENTS OR GUARDIAN.

SECTION 1207. English Law.
1208. American Law.
1209. Validity of Marriages Without Parental Consent.
1210. When Guardian Should Consent.
1211. Stepparent.

§ 1207. English Law.

The consent of parents and guardians is one of those formalities which marriage celebration acts now commonly prescribe in the interest of society, as they do banns or the procurement of a license generally for better publicity.

The consent of parents or guardians was not necessary to perfect a marriage at the common law.[43] But Lord Hardwicke's Act made the marriage of minors void without such consent first obtained.[44] This proved intolerable. A *bona fide* and apparently regular marriage was in one instance set aside, after important rights had intervened, for no other cause than that an absent father, supposed to be dead, but turning up unexpectedly, had failed to bestow his permission, and the mother had acted in his stead.[45] Gretna Green marriages, on Scotch soil, became the usual recourse for children with unwiillng protectors.[46] Hence the law was afterwards modified, so that, without the requisite consent, marriages, although forbidden, might remain valid.[47]

43. Koonce v. Wallace, 7 Jones Law (N. C.) 194.

44. 26 Geo. II., ch. 33. See 2 Kent Com. 85; Rex v. Hodnett, 1 T. R. 96.

45. Hayes v. Watts, 2 Phillim. 43.

46. Stat. 19 & 20 Viet., ch. 96, to stop these runaway matehes, enaets that no irregular marriage contracted in Scotland shall be valid unless one of the parties had his or her usual residenee in Scotland, or lived there for 21 days preceding the marriage. Lawford v. Davies, 39 L. T. (N. S.) 111.

47. Rex v. Birmingham, 8 B. & C. 29; Shelf. Mar. & Div. 309-322; Stat. 4 Geo. IV., ch. 76.

§ 1208. American Law.

In this country statutes commonly require that minors shall before marrying obtain the consent of their parents or guardians and the expression of consent is in some States made a prerequisite to granting the marriage license.[48]

§ 1209. Validity of Marriages Without Parental Consent.

At common law the marriage of infants under the age of seven years was absolutely void but persons at least seven years old and under the age of consent could contract a voidable marriage. But where the minors are over the age of consent and the statute requires the consent of parents or guardians to their marriage[49] a marriage duly solemnized although without the consent of the parents or guardians of minors as required by law is valid,[50] as statutes invalidating the marriage of minors without the consent of the parents or guardians are directory merely and a marriage under a license in violation of such statute is valid.[51] Where the law provides that a license may be issued for minors if the written consent of the parents is obtained this does not invalidate the marriage of minors above the common-law age of consent married without such consent of the parents. Lack of such consent does

48. See Fitzsimmons v. Buckley, 59 Ala. 539.

49. *See ante*, § 1121.

50. *In re* Ambrose, 170 Cal. 160, 149 P. 43; Reifschneider v. Reifschneider, 241 Ill. 92, 89 N. E. 255; (1908), 144 Ill. App. 119; Matthes v. Matthes, 198 Ill. App. 515; People v. Ham, 206 Ill. App. 543; Milford v. Worcester, 7 Mass. 48; Cunningham v. Cunningham, 128 N. Y. S. 104, 70 Misc. 129; (1911), 130 N. Y. S. 1109, 145 App. Div. 919; 1 Bish. Mar. & Div., §§ 341-347 and cases cited; Smyth v. State, 13 Ark. 696; Wyckoff v. Boggs, 2 Halst. 188; Bollin v. Shiner, 2 Jones (Pa.), 205. And see Wood v. Adams, 35 N. H. 32; Kent v. State, 8 Blackf. 163; Askew v. Dupree, 30 Ga. 173; Fitzpatrick v. Fitzpatrick, 6 Nev. 63; Adams v. Cutright, 53 Ill. 361; State v. Dole, 20 La. Ann. 378. The language of some statutes leaves the point in doubt as to whether marriages without the consent of parents renders the marriage void or only subjects offending parties, including the person who performs the ceremony, to a penalty. But the latter is, of course, to be presumed, rather than the former.

51. Browning v. Browning, 89 Kan. 98, 130 P. 852, L. R. A. 1916C, 737.

not invalidate the marriage but only subjects those who have neglected to acquire it to the penalties of the law.[52]

Following the general principle that no act good at common law is void unless the statutes expressly so provide it is commonly held that a marriage otherwise valid is not made invalid by the fact that it was held under a license issued to one under age without the consent of the parent or guardian as required by law. The officer issuing the license may be subject to a penalty but this does not affect the marriage itself.[53]

§ 1210. When Guardian Should Consent.

Clandestine marriages are doubtless to be discouraged, and the law will willingly inflict penalties upon clergymen, magistrates, and all others who aid the parties in their unwise conduct, the penalty serving in a measure as indemnification to the parent or guardian; but experience shows that legislation cannot safely interpose much farther.

Under such statutes (which, however, vary in language and scope in different States), it has been held that if a minor has both parent and guardian, the guardian should consent in preference;[54] though it might appear more proper to consider which has the actual care and government of the minor. One who has relinquished the parental control cannot sue for the penalty; but a father's unfitness is not pertinent to the issue of uniting his minor child in marriage without his leave,[55] nor ground for accepting the mother's sole consent instead.[56] Where there is no parent or guardian of a minor and the law requires the consent of a parent or guardian a guardian must be appointed before a license can issue.[57]

52. Cushman v. Cushman, 80 Wash. 615, 142 P. 26, L. R. A. 1916C, 732.

53. Johnson v. Alexander, 27 Cal. App. Dec. 823.

54. Vaughn v. McQueen, 9 Mo. 327.

55. Robinson v. English, 10 Casey, 324.

56. Ely v. Gammel, 52 Ala. 584.

57. People v. Schoonmaker, 119 Mich. 242, 77 N. W. 934, 5 Det. Leg. N. 802.

§ 1211. Stepparent.

The consent of a stepparent is unnecessary under statutes requiring the consent of parents.[58]

58. People v. Schoonmaker, 117 Mich. 190, 75 N. W. 439, 5 Det. Leg. N. 177, 72 Am. St. R. 560 (as not natural guardian); Owens v. Munden, 168 N. C. 266, 84 S. E. 257.

CHAPTER XVI.

MARRIAGE MADE WHEN PARTIES NOT PRESENT TOGETHER.

SECTION 1212. Marriage by Proxy or Mail.
1213. Marriage by Telephone.

§ 1212. Marriage by Proxy or Mail.

Marriage by proxy or without the presence of the parties at a ceremony was formerly allowed in the Roman law and was also recognized under the canon law,[59] and the English law until the eighteenth century.[60] It was thus a part of the common law of England at the time of the settlement of this country, and was probably incorporated by the colonists as such into their common law. Statutes in many States requiring certain details as to the ceremony and presence of the parties have rendered this common law obsolete, but in States where common-law marriages are still recognized, and where consummation of the marriage is not necessary for its validity, there seems no reason to doubt that a marriage by written contract of parties not in the presence of each other may be valid.[61] Such a marriage will be governed by the law of the State where the contract is made, which is the place where the acceptance is mailed,[62] although there is strong authority that a marriage by mail can be sustained only when valid by the laws where both live.[63]

The exigencies of the Great War revived the interest in such marriages, and laws were passed in Belgium, France and Italy to enable soldiers in service to contract marriages with women at

59. 32 Harvard Law Review, 473.

60. Swinburne Espousals, 2d ed., 162. See, however, Regina v. Millis, 10 Cl. & F. 534.

61. Great Northern Ry. Co. v. Johnson, 254 Fed. 683.

62. Great Northern Ry. Co. v. Johnson, 254 Fed. 683.

63. See Sassen v. Campbell, 3 Sc. Sess. Cas. 108.

home.[64] In this country the Adjutant General, on December 21, 1918, advised the military authorities that they might assist soldiers in contracting marriages with women at home, advising them, however, of the dangers of this course, that the validity of such marriages would depend on the law of their domicile, and that the legality of such marriages was in this country a matter of grave uncertainty.

§ 1213. Marriage by Telephone.

The validity of a marriage by telephone has never been authoritatively settled, but instances of such marriages are reported during the exigencies of war times.[65] If both man and woman are at the time in States where a common-law marriage is recognized, it seems that such a marriage is valid as a contract by telephone is valid, and no greater ceremony should be required in such States for a marriage than for any other contract. But in States where the statutes require certain ceremonies it seems very doubtful whether such a marriage would be sustained under precedents frowning on official acts by telephone,[66] but there is always a chance that the courts will strain a point to assist a brave man in uniform.

64. 32 Harvard Law Review, 473, 479.

65. See 4 Virginia Law Register (N. S.), 636.

66. Carnes v. Carnes, 138 Ga. 1 (oath); Sullivan v. National Bank, 169 App. Div. (N. Y.) 469 (oath); Wester v. Hurt, 123 Tenn. 508, Ann. Cas. 1912C, 329 (acknowledgment).

CHAPTER XVII.

MARRIAGE LICENSE AND RECORD.

SECTION 1214. Who May Issue.
1215. Presumption of Validity of License.
1216. Banns.
1217. License Improperly Issued.
1218. Fraud in Obtaining License.
1219. Effect of Failure to Obtain License on Ceremonial Marriage.
1220. Effect of Failure to Obtain License on Common-Law Marriage.
1221. Official Issuing License Charged With Duty of Inquiry.
1222. Record.
1223. Fraudulent Certificate.

§ 1214. Who May Issue.

The license must be issued by the officer named in the statute.[67]

§ 1215. Presumption of Validity of License.

Presumptions are indulged in favor of the validity of a license issued by an officer duly authorized.[68]

§ 1216. Banns.

The English law insists pretty strictly upon the publication of banns, whereas in this country, where church and State are divorced, this formality is now quite generally dispensed with,[69] although formerly required in some of the older States, but even there a marriage duly solemnized by a proper official is valid

67. Mahon v. State, 46 Tex. Cr. R. 234, 79 S. W. 28 (deputy county clerk).

68. Reifschneider v. Reifschneider, 241 Ill. 92, 89 N. E. 255; (1908), 144 Ill. App. 119 (although ceremony not performed in county seat); State v. Day, 108 Minn. 121, 121 N. W. 611 (oath presumed).

A marriage is not invalidated by the fact that the woman alone procured the license, nor by the fact that there was an interval of four months between the date of the license and the date of the marriage. *In re* Miller's Estate, 34 Pa. Super. Ct. 385.

69. Cope v. Burt, 1 Hag. Con. 434.

although the banns were not published as required.[70] As to the due proclamation of banns, collateral points concerning ecclesiastical authority are inappropriate.[71]

§ 1217. License Improperly Issued.

A marriage solemnized without publication of banns as required by law, and without consent of parents or guardians, is valid between the parties,[72] and violations of the law in issuing the license or other requirement of the statute will not render the marriage void.[73] Though the parties may have failed to observe certain formalities of license or registry, their marriage will generally be held good in both England and this country.[74] The same may be said of public officers upon whom the duty is imposed of issuing a proper license to suitable parties desiring marriage; which license, as our local statutes frequently provide, the magistrate or minister ought to require the parties to produce, before uniting them.[75]

A marriage is not void merely because the wife failed to sign the proper papers, although the marriage was duly celebrated.[76]

A marriage license may be void when signed by the issuing officer in blank and filled up with the names of the parties by the magistrate who officiated.[77]

70. Milford v. Worcester, 7 Mass. 48.

71. Hutton v. Harper, 1 H. L. App. 464.

72. Milford v. Worcester, 7 Mass. 48; Parton v. Hervey, 67 Mass. 119.

73. Switchmen's Union of North America v. Gillerman, 196 Mich. 141, 162 N. W. 1024 (false statement of residence in county); Sturgis v. Sturgis, 51 Ore. 10, 93 P. 696; *In re* Svendsen's Estate, 37 S. D. 353, 158 N. W. 410.

74. See Sichel v. Lambert, 15 C. B. (N. S.) 781; Prowse v. Spurway, 26 W. R. 116; Cannon v. Alsbury, 1 A. K. Marsh. 76; Askew v. Dupree, 30 Ga. 173; Blackburn v. Crawfords, 3 Wall. 175; Holmes v. Holmes, 6 La. 463; Stevenson v. Gray, 17 B. Monr. 193.

75. Ely v. Gammel, 52 Ala. 584; Mitchell v. Davis, 58 Ala. 615; Askew v. Dupree, 30 Ga. 173. See § 1221, *post*.

76. Duvigneaud v. Loquet, 131 La. 568, 59 So. 992.

77. Hawkins v. Hawkins, 142 Ala.

§ 1218. Fraud in Obtaining License.

In a prosecution for falsely swearing to the age of the girl in a marriage certificate application the defendant may show in defence that the statement was one which on reasonable grounds he believed to be true, but it is not enough that he did not know the facts, and the State is not bound to prove that he swore to something which he knew to be untrue.[78]

§ 1219. Effect of Failure to Obtain License on Ceremonial Marriage.

In some States the statutory requirement of a license is regarded as directory only, and failure to obtain a valid license does not invalidate a marriage performed with proper ceremony,[79] while in other States such failure renders the marriage void.[80]

§ 1220. Effect of Failure to Obtain License on Common-Law Marriage.

A statute requiring a license and certain form of celebration, but without expressly declaring other forms of marriage void,

571, 38 So. 640, 110 Am. St. R. 53; Herd v. Herd, 69 So. 885, L. R. A. 1916B, 1243.

78. Kansas v. Rupp, 96 Kan. 446, 151 P. 1111, L. R. A. 1916B, 848.

79. Franklin v. Lee, 30 Ind. App. 31, 62 N. E. 78.

If the relations between a man and woman, who were first cousins, prior to July 4, 1909, when marriages between cousins were prohibited, were such as to establish a valid common-law marriage, the enactment of the statute or the performance of an invalid ceremonial marriage would not affect the validity of the previous marriage by consent. *In re* Wittick's Estate, 164 Ia. 485, 145 N. W. 913; Feehley v. Feehley, 129 Md. 565, 99 A. 663; Melcher v. Melcher (Neb.), 169 N. W. 720; Davidson v. Ream, 161 N. Y. S. 73, 97 Misc. 89; State v. McGilvery, 20 Wash. 240, 55 P. 115. See *In re* Ruffino's Estate, 116 Cal. 304, 48 P. 127. See *In re* Huston's Estate, 48 Mont. 524, 139 P. 458 (where no ceremony after divorce of one of the parties and no open cohabitation, marriage was invalid).

80. Hawkins v. Hawkins, 142 Ala. 571, 38 So. 640, 110 Am. St. R. 53; Offield v. Davis, 100 Va. 250, 40 S. E. 910. See *In re* Meade's Estate (W. Va.), 97 S. E. 127.

does not render void a common-law marriage,[81] but may do so.[82] Marriage followed by cohabitation is valid although license required was not obtained.[83]

At common law a religious ceremony in celebration of the civil contract was sufficient to make the marriage lawful. In view of the important considerations of morality and legitimacy involved it is manifestly a sound and just rule of construction that statutes providing for marriage licenses are not held to have the effect of nullifying for noncompliance with their terms of marriage valid at common law unless such an intention is plainly disclosed. The statutory provision for license to marry should not be regarded as mandatory and vital to the validity of a marriage in the absence of a clear indication of a legislative purpose that it should be so construed.[84]

§ 1221. Official Issuing License Charged With Duty of Inquiry.

The duty of the person issuing the license is not ministerial solely, but he may be charged with the duty of making reasonable inquiry as to the identity or capacity of the parties to marry or their right to a license,[85] and the statute may provide a penalty

81. Reifschneider v. Reifschneider, 144 Ill. App. 119; (1909), 241 Ill. 92, 89 N. E. 255; State v. Bittick, 103 Mo. 183, 15 S. W. 325, 11 L. R. A. 587, 23 Am. St. R. 869; State v. Zichfeld, 23 Nev. 304, 46 P. 802, 34 L. R. A. 784, 62 Am. St. R. 800; Ziegler v. P. Cassidy's Sons, 220 N. Y. 98, 115 N. E. 471, 155 N. Y. S. 1151, 171 App. Div. 959; Draughn v. State (Okla. Cr. App.), 158 P. 890; *In re* Svenden's Estate, 37 S. D. 353, 158 N. W. 410; Burks v. State, 50 Tex. Cr. R. 47, 94 S. W. 1040; Knight v. State, 55 Tex. Civ. App. 243, 116 S. W. 56.

82. Smith v. North Memphis Sav. Bank, 115 Tenn. 12, 89 S. W. 392. See *contra*, Snuffer v. Karr, 197 Mo. 182, 94 S. W. 983 (under Tennessee law).

83. 25 App. D. C. 567; Travers v. Reinhardt, 27 S. Ct. 563, 205 U. S. 423, 51 L. Ed. 865; Davidson v. Ream, 161 N. Y. S. 73, 97 Misc. 89; *In re* Love's Estate, 42 Okla. 478, 142 P. 305; McDonald v. White, 46 Wash. 334, 89 P. 891.

84. Feehley v. Feehley, 129 Md. 565, 99 A. 663, L. R. A. 1917C, 1017.

85. Brewer v. Kingsberry, 69 Ga. 754 (age of applicant); Olsen v. People, 219 Ill. 40, 76 N. E. 89; Morrison v. Teague, 143 N. C. 187, 55 S. E. 521; Savage v. Moore, 167 N. C. 383, 83 S. E. 549; Laney v. Mackey, 144

recoverable for the issuing of a license improperly or without reasonable inquiry;[86] but in the absence of such statute a father who by marriage lost the services of his minor child cannot recover damages against an officer improperly issuing such license.[87]

In such an action the question of what is a reasonable inquiry where there is no conflict in evidence is for the court,[88] and the burden is on the plaintiff to show that reasonable inquiry was not made.[89] A complaint alleging that the plaintiff is the "father" of the girl means the legal father.[90]

Where the statute requires that the authorities before issuing a marriage license shall make reasonable inquiry to satisfy themselves that the applicants are of age, this is not done where the license is issued relying on the statements of two men unknown to the license office who turned out to be bad men. The mere personal appearance of an entire stranger is not sufficient.[91]

N. C. 630, 57 S. E. 386 (may show officer's failure to administer oath as bearing on inquiry made); Agent v. Willis, 124 N. C. 29, 32 S. E. 322; Furr v. Johnson, 140 N. C. 157, 52 S. E. 664 (reliance on statements of applicant may be sufficient); Harcum v. Marsh, 130 N. C. 154, 41 S. E. 6; Joyner v. Harris, 157 N. C. 295, 72 S. E. 970; Gray v. Lentz, 173 N. C. 346, 91 S. E. 1024; Evans v. Johnson (Tex. Civ. App. 1901), 61 S. W. 143; *contra*, Greenberg v. Greenberg, 160 N. Y. S. 1026, 97 Misc. 153 (infant who falsely attests he is over 21 is entitled to license).

86. Crook v. Webb, 125 Ala. 457, 28 So. 384; Barnidge v. Kilpatrick, 111 La. 587, 35 So. 757; Trollinger v. Boroughs, 133 N. C. 312, 45 S. E. 662; Littleton v. Harr, 158 N. C. 566, 74 S. E. 12 (consent of mother no bar to suit by father); Gray v. Lentz, 173 N. C. 346, 91 S. E. 1024; Julian v. Daniel, 175 N. C. 549, 95 S. E. 907 (reliance on statements of persons unknown to register held not to show due diligence). See Evans v. Johnson (Tex. Civ. App. 1901), 61 S. W. 143 (father's consent an estoppel).

87. Wilkinson v. Dellinger, 126 N. C. 462, 35 S. E. 819; Jackson v. Banister, 47 Tex. Civ. App. 317, 105 S. W. 66.

88. Julian v. Daniel, 175 N. C. 549, 95 S. E. 907; Morrison v. Teague, 143 N. C. 187, 55 S. E. 521; Harcum v. Marsh, 130 N. C. 154, 41 S. E. 6; Trollinger v. Boroughs, 133 N. C. 312, 45 S. E. 662; Gray v. Lentz, 173 N. C. 346, 91 S. E. 1024.

89. Furr v. Jonnson, 140 N. C. 157, 52 S. E. 664.

90. Crook v. Webb, 125 Ala. 457, 28 So. 384.

91. Gray v. Lentz (N. C.), 91 S. E. 1024, L. R. A. 1917E, 863.

§ 1222. Record.

The licensing officer may have a duty to record each license when issued,[92] and a record should be kept of the marriage as provided by statute.[93]

The marriage records are not constructive notice to third persons dealing with either spouse.[94]

§ 1223. Fraudulent Certificate.

A marriage properly celebrated is not rendered void simply because the parties to it unite and file a false certificate of the marriage for the purpose of concealing the birth of an illegitimate child.[95]

92. State *ex rel.* Stephens v. Moore, 96 Mo. App. 431, 70 S. W. 512.

93. Kahn v. Kahn, 113 N. Y. S. 256, 60 Misc. 334. See Randazzo v. Roppolo, 105 N. Y. S. 481 (one who was impersonated has no right to expunge record).

94. Steves v. Smith, 49 Tex. Civ. App. 126, 107 S. W. 141.

95. State v. Tillinghast, 25 R. I. 391, 56 A. 181.

CHAPTER XVIII.

EVIDENCE OF MARRIAGE.

SECTION 1224. Oral Evidence of Parties.
1225. Oral Evidence of Witnesses.
1226. Declarations of Parties.
1227. Declarations of Family.
1228. Conduct of Parties Prior to Marriage.
1229. General Reputation.
1230. Marriage Records.
1231. Record Not Necessary.
1232. Collateral Records.
1233. Marriage Certificate.
1234. Unofficial Records.
1235. Divorce Decree.
1236. Absence of Record of Divorce Claimed.
1237. Official Character of Person Performing Ceremony.

§ 1224. Oral Evidence of Parties.

Where not rendered incompetent by the usual rules of evidence, as parties interested, parties to the record, and the like, the persons alleged to have been married may give their own testimony on that point; but to examine the question of competency in such cases is foreign to our present purpose.[96]

§ 1225. Oral Evidence of Witnesses.

Direct proof of the marriage, other than by the record, is perhaps the most satisfactory of all. The fact may be established by

96. 1 Greenl. Ev., § 342; State v. Wilson, 22 Ia. 364; Allen v. Hall, 2 Nott & McC. 114.

Testimony of the parties to a marriage may be received. Southern Ry. Co. v. Brown, 126 Ga. 1, 54 S. E. 911; Labonte v. Davison (Ida.), 175 P. 588; *In re* Derinza, 229 Mass. 435, 118 N. E. 942; Commonwealth v. Dill, 156 Mass. 226, 30 N. E. 1016; Richardson v. State, 103 Md. 112, 63 A. 317; Ross v. Sparks, 81 N. J. Eq. 117, 88 A. 384; decree affirmed (Err. & App.), 81 N. J. Eq. 211, 88 A. 385; Frederick v. Morse, 88 Vt. 126, 92 A. 16.

the clergyman or magistrate who solemnized the marriage; or by any third person who was present at the ceremony.[97]

§ 1226. Declarations of Parties.

Circumstantial evidence may establish the fact of marriage. Thus, the admissions of either or both parties, or the public acknowledgment by one of the other, as a spouse, may be shown in the case of a clandestine marriage or under circumstances which render it difficult or impossible to adduce more direct testimony.[98] But proof of marriage in fact being needful at the outset, wherever better testimony is accessible, its production ought to be required. Deliberate admissions of marriage by one party are strong evidence against that party, and in civil cases where the other seeks to establish the fact. But admissions, and indirect testimony in general, seem unfavorably regarded in indictments for bigamy, and perhaps in actions for criminal conversation besides; presumptions, as we have seen, being here deemed insufficient proof of the fact, and strong extraneous proof being desired when the issue is so sternly presented against a defendant;[1] though the course favored by several cases is to weigh the confession or admission by the light of circumstances, and not exclude it utterly.[2] The declarations of parties, and other attendant circumstances of cohabitation, all of which are admissible, as part of the *res gestæ*, to show a virtuous intercourse between man and woman, must, together with the repute originating in consequence,

97. Wilson v. Piper, 77 Ind. 437; Lindsey's Devisee v. Smith, 131 Ky. 176, 114 S. W. 779; Commonwealth v. Norcross, 9 Mass. 492; Root v. Fellowes, 60 Mass. 30; Boling v. State, 91 Neb. 599, 136 N. W. 1078; Commonwealth v. Norcross, 9 Mass. 492; Bruce v. Burke, 2 Add. Ec. 471; Patterson v. Gaines, 6 How. (U. S.) 550.

98. See Maxwell v. Maxwell, Milw. 290. What is called the establishment of marriage by habit and repute, considered *ante*, § 1177, is closely allied to this sort of proof.

1. 1 East P. C. 471; People v. Humphrey, 7 Johns. 314; State v. Roswell, 6 Conn. 446; People v. Lambert, 5 Mich. 349. See Morris v. Miller, 4 Burr. 2057.

2. 1 Bish. Mar. & Div., §§ 497-502; State v. Roswell, 6 Conn. 446; Wolverton v. State, 16 Ohio, 173; Peppinger v. Low, 1 Halst. 384; Forney v. Hallacher, 8 S. & R. 159.

be contemporaneous with that intercourse and not subsequent.[3] That the parties by their words or acts in various ways admitted the marriage may be admissible as admissions[4] or to prove that no such marriage took place[5] or as spontaneous statements when not self-serving,[6] but such declarations are mere hearsay in a suit in which neither the husband or wife are parties.[7] Declarations of

3. Taylor, *in re*, 9 Paige, 611, per Chancellor Walworth.

4. Moore v. Heineke, 119 Ala. 627, 24 So. 374; Bynon v. State, 117 Ala. 80, 23 So. 640, 67 Am. St. R. 163; Whigby v. Burnham, 135 Ga. 584, 69 S. E. 1114; Laurence v. Laurence, 164 Ill. 367, 45 N. E. 1071 (letters); Collard v. Burch, 138 Mo. App. 94, 119 S. W. 1009; Forbes v. Burgess, 158 N. C. 131, 73 S. E. 792; Walker v. Walker, 151 N. C. 164, 65 S. E. 923; Carter v. Reaves, 167 N. C. 131, 83 S. E. 248; Stackhouse v. Stotenbur, 47 N. Y. S. 940, 22 App. Div. 312; Perrine v. Kohr, 20 Pa. Super. Ct. 36; State v. Tillinghast, 25 R. I. 391, 56 A. 181; Fryer v. Fryer (S. C. 1832), Rich. Eq. Cas. 85 (such declarations may be rebutted by declarations of the same person to the contrary); Cave v. Cave, 101 S. C. 40, 85 S. E. 244 (on issue of legitimacy of issue); Galveston, H. & S. A. Ry. Co. v. Cody, 20 Tex. Civ. App. 520, 50 S. W. 135; Womack v. Tankersley, 78 Va. 242; Weatherall v. Weatherall, 56 Wash. 344, 105 P. 822 (although common-law marriage invalid).

5. Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451 (declarations of one of parties during cohabitation are admissible as *res gestae*); Topper v. Perry, 197 Mo. 531, 95 S. W. 203, 114 Am. St. R. 777; *In re* Reinhardt's Estate, 160 N. Y. S. 828, 95 Misc. 413 (claim for services against deceased and deceased's statement that he was not married are evidence against claimant); *In re* Svenden's Estate, 37 S. D. 353, 158 N. W. 410; Nye v. State, 179 S. W. 100 (subsequent marriage by one of parties).

Contra, Barker v. Barker, 151 N. Y. S. 811, 88 Misc. 300 (not to disprove ceremonial marriage); Adams v. Wm. Cameron & Co. (Tex. Civ. App.), 161 S. W. 417.

6. Coleman v. James (Okla.), 169 P. 1064 (declarations of parties as to whether their relation is illicit admitted); Schwingle v. Keifer (Tex. Civ. App. 1911), 135 S. W. 194.

7. Moore v. Heineke, 119 Ala. 627, 24 So. 374; *In re* James' Estate, 124 Cal. 653, 57 P. 578, 1008; *In re* Colton's Estate, 129 Ia. 542, 105 N. W. 1008 (inadmissible to establish subsequent marriage).

Declarations of persons who knew the parties are admissible to establish a marriage between slaves before the Civil War. Dunn v. Garnett, 129 Ky. 728, 112 S. W. 841; *In re* Hulett's Estate, 66 Minn. 327, 69 N. W. 31, 34 L. R. A. 384, 61 Am. St. R. 419; Smith v. Fuller, 108 N. W. 765 (joining in deeds as husband and wife). See Bowman v. Little, 101 Md. 273, 61 A. 223, 657 (declarations not admissible to establish identity of parties).

deceased that he was married to claimant may be used to support claimant's rights as his wife[8] but declarations of one of the parties to the alleged marriage who is since deceased are not admissible against the other party if not made in his presence.[9] But declarations of the parties are not competent to negative a marriage where a present agreement to marry is shown followed by cohabitation.[10]

§ 1227. Declarations of Family.

Marriage may be proved by the declarations of persons related by blood or marriage to the person whose marriage is sought to be proved.[11]

§ 1228. Conduct of Parties Prior to Marriage.

It may be shown in rebuttal of a claimed common-law marriage that the woman was living in a bawdy house and was a prostitute,[12] but evidence of prior acts of immorality of the parties is inadmissible.[13]

§ 1229. General Reputation.[14]

Marriage may be implied from general reputation in the com-

8. Harkrader v. Reed, 5 Alaska, 668; Bellinger v. Devine, 269 Ill. 72, 109 N. E. 666 (as admissions against interest); Pope v. Missouri Pac. Ry. Co., 175 S. W. 955; Linsey v. Jefferson (Okla.), 172 P. 641. See *In re* Torrence's Estate, 47 Pa. Super. Ct. 509 (divorce record competent).

9. Hubatka v. Maierhoffer, 79 A. 346; Same v. Meyerhofer (Sup. 1910), 75 A. 454.

10. Davis v. Stouffer, 132 Mo. App. 555, 112 S. W. 282.

11. *On an issue of heirship*, evidence of declarations made by deceased members of the family that O.'s father contracted a second marriage was incompetent to prove that O.'s mother ever became the second wife of his father; she being in no manner identified. Osborne v. McDonald, 159 F. 791; Jennings v. Webb, 8 App. D. C. 43; Gorden v. Gorden, 283 Ill. 182, 119 N. E. 312 (defining pedigree evidence).

12. Butler v. Wilson, 153 P. 823 (evidence inadmissible when remote in time); Berger v. Kirby (Tex. Civ. App. 1911), 135 S. W. 1122; Grigsby v. Reib (Tex. Civ. App. 1911), 139 S. W. 1027).

13. *In re* James' Estate, 124 Cal. 653, 57 P. 578; *In re* Comley's Estate, 185 Pa. St. 208, 39 A. 890, 42 W. N. C. 51.

14. Common-law marriage by cohabitation and reputation, see *ante*, § 1177.

munity[15] and not by partial or divided reputation,[16] and in States where common-law marriages are not recognized reputation raises a presumption of a valid marriage, which may, however, be rebutted like other presumptions[17] as where one of the parties has a spouse living,[18] but general reputation of a prior marriage will not alone suffice to invalidate a formal marriage duly entered into.[19]

The origin of the cohabitation must have been consistent with a matrimonial intent unless such intent appears later,[20]

15. Adger v. Ackerman, 52 C. C. A. 568, 115 F. 124; Bynon v. State, 117 Ala. 80, 23 So. 640, 67 Am. St. R. 163; Estes v. Merrill, 181 S. W. 136; *In re* Baldwin's Estate, 162 Cal. 471, 123 P. 267.

McKenna v. McKenna, 180 Ill. 577, 54 N. E. 641, 73 Ill. App. 64 (sexual intimacy alone is insufficient); *In re* Boyington's Estate, 157 Ia. 467, 137 N. W. 949; Supreme Tent of Knights of Maccabees of the World v. McAllister, 132 Mich. 69, 92 N. W. 770, 102 Am. St. R. 382; O'Malley v. O'Malley, 46 Mont. 549, 129 P. 501; Bishop v. Brittain Inv. Co., 229 Mo. 699, 129 S. W. 668; *In re* Brush, 49 N. Y. S. 803, 25 App. Div. 610; McFadden v. McFadden, 32 Pa. Super. Ct. 534; Chapman v. Chapman, 16 Tex. Civ. App. 382, 41 S. W. 533; Houston Oil Co. of Texas v. Griggs (Tex. Civ. App.), 181 S. W. 833; Harlan v. Harlan (Tex. Civ. App. 1910), 125 S. W. 950.

General repute as to the marital relation means the understanding among neighbors and acquaintances with whom the parties associate in their daily life that they are living together as husband and wife, and not in meretricious intercourse. Klipfel's Estate v. Klipfel, 41 Colo. 40, 92 P. 26.

16. Taylor v. Taylor, 10 Colo. App. 303, 50 P. 1049; State v. Wilson, 5 Pennewill (Del.), 77, 62 A. 227. *In re* Boyington's Estate, 157 Ia. 467, 137 N. W. 949.

Fryer v. Fryer (S. C. 1832), Rich. Eq. Cas. 85; Eldred v. Eldred, 97 Va. 606, 34 S. E. 477; Weidenhoft v. Primm, 16 Wyo. 340, 94 P. 453.

17. Eldred v. Eldred, 97 Va. 606, 34 S. E. 477.

18. Blanks v. Southern Ry. Co., 82 Miss. 703, 35 So. 570.

19. State v. St. John, 94 Mo. App. 229, 68 S. W. 374.

20. Makel v. John Hancock Mut. Life Ins. Co., 88 N. Y. S. 757, 95 App. Div. 241 (marriage not fraud where parties merely agreed to "go housekeeping"); Williams v. Herrick, 21 R. I. 401, 43 A. 1036, 79 Am. St. R. 809; Cuneo v. Cuneo, 24 Tex. Civ. App. 436, 59 S. W. 284.

Where cohabitation is in the beginning illicit affirmative proof of a subsequent present intention to change such relation into a legitimate relation of husband and wife must appear. *In re* Boyington's Estate, 157 Ia. 467, 137 N. W. 949.

and cohabitation or refutation thereof alone is not sufficient.[21]

§ 1230. Marriage Records.

More satisfactory than presumptions, which may always be rebutted, and in some cases, as we have seen, are quite insufficient, is the proof of a marriage in fact over and above presumptions. Record proof of a marriage celebration is always appropriate where the fact itself is at issue. In England, and probably all of the United States, the law requires marriages to be registered by the proper officer; parish church records being the more common in England, and town or civil records in America. These records are of great value as testimony, not necessarily because of the incidental signatures of parties, but because these are public records, kept in a public place, under authority of the law.[22] Whether the issue be civil or criminal, the record-book may be offered in evidence, or a certificate of the particular record by the officer having custody of the book; or once more, any third person, competent to be sworn as a witness, may, under the sanction of his oath, verify the extract of a particular record made by himself.[23] But nothing more is thus proved than the facts which ought to be entered in the register, and the testimony may be contradicted or shown to be a forgery or unauthorized entry.[24]

The official record of the marriage may be put in evidence thereof,[25] but is not necessary.[26]

The nonexistence of a marriage record cannot be shown by the

21. Compton v. Benham, 44 Ind. App. 51, 85 N. E. 365; Judson v. Judson, 147 Mich. 518, 111 N. W. 78, 13 Det. Leg. N. 1146; State v. Kennedy, 207 Mo. 528, 106 S. W. 57.

22. 1 Salk. 281; Rice v. State, 7 Humph. 14; Woods v. Woods, 2 Curt. Ec. 516.

23. 1 Greenl. Ev., § 483.

24. See State v. Colby, 51 Vt. 291, where the mere record of the town clerk, who could not authenticate the minister's return to him, was discredited.

25. Casley v. Mitchell, 121 Ia. 96, 96 N. W. 725.

26. Bronnenburg v. Charman, 80 Ind. 475. See *In re* Derinza, 229 Mass. 435, 118 N. E. 942 (purported copy of Italian certificate not admitted); *contra*, Green v. New Orleans, S. & G. I. R. Co., 141 La. 120,

testimony of a witness that the officer told her there was no such record,[27] but the absence of a record may be explained.[28]

§ 1231. Record Not Necessary.

Record evidence of a marriage is not necessary, but it may be proved by any kind of evidence, direct or circumstantial.[29]

§ 1232. Collateral Records.

Marriage appearing in records where the marriage was a collateral issue are not admissible to prove marriage, but the marriage record itself must be produced. Thus a copy of a separate maintenance decree is inadmissible to show marriage on a collateral issue,[30] and marriage cannot be shown by a recital thereof in probate papers.[31]

74 So. 717 (under statute certified copy of public record necessary to prove marriage).

27. People v. Loomis, 106 Mich. 250, 64 N. W. 18.

28. Labonte v. Davidson (Ida.), 175 P. 588.

29. Bynon v. State, 117 Ala. 80, 23 So. 640, 67 Am. St. R. 163; Strodenmeyer v. Hart, 155 Ala. 243, 46 So. 488 (letters); Sellers v. Page, 127 Ga. 633, 56 S. E. 1011; Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451 (subsequent conduct of parties); Casley v. Mitchell, 121 Ia. 96, 96 N. W. 725; Smith v. Fuller, 138 Ia. 91, 115 N. W. 912; Mazzei v. Gruis, 128 La. 860, 55 So. 555; Watson v. Lawrence, 134 La. 194, 63 So. 873; Albinest v. Yazoo & M. V. Ry. Co., 107 La. 133, 31 So. 675; Bowman v. Little, 101 Md. 273, 61 A. 223, 657; Heminway v. Miller, 87 Minn. 123, 91 N. W. 428; Shattuck v. Shattuck's Estate, 118 Minn. 60, 136 N. W. 409 (woman may explain why marriage not given publicity); *In re* Imboden's Estate, 111 Mo. App. 220, 86 S. W. 263; Coad v. Coad, 87 Neb. 290, 127 N. W. 455; Dorgeloh v. Murtha, 156 N. Y. S. 181, 92 Misc. 279 (denial of marriage by parties); Ferrie v. Public Administrator (N. Y. Sur. 1855), 3 Bradf. Sur. 151; *In re* Sanders' Estate (Okla.), 168 P. 197 (common-law marriage); Jordan v. Johnson (Tex. Civ. App.), 155 S. W. 1194; Whittle v. State, 43 Tex. Cr. R. 468, 66 S. W. 771; State v. Thompson, 31 Utah, 228, 87 P. 709. See Phillips v. Palmer, 56 Tex. Civ. App. 91, 120 S. W. 911.

30. American Woolen Co. of New York v. Same, 267 Ill. 11, 107 N. E. 882.

31. Berger v. Kirby (Tex. Civ. App. 1911), 135 S. W. 1122.

§ 1233. Marriage Certificate.

A marriage certificate is an instrument which certifies a marriage and is executed by the person officiating,[32] and is an instrument not admissible as evidence *per se*, according to the better class of cases, and yet, in connection with testimony upon oath, establishing a marriage in fact, and, more particularly when shown to have been given contemporaneously with the marriage, a valuable piece of testimony,[33] and may be introduced as evidence of the marriage.[34]

A marriage certificate, or record, or certificate of record, shows only that two persons bearing the names mentioned were united at the time and place specified; and hence the identity of those names with the persons whose marriage in fact is at issue remains to be established by other proof, circumstantial being in general sufficient for that purpose,[35] and the marriage certificate is not conclusive on the identity of the parties.[36]

§ 1234. Unofficial Records.

And akin to such unofficial certificates are the memoranda which, independently of statute requirements, an officiating min-

32. Spencer v. Spencer, 147 N. Y. S. 111, 84 Misc. 264.

33. Nokes v. Milward, 2 Add. Ec. 386; Hill v. Hill, 8 Casey, 511. The growth of a practice in some States, of permitting the unsworn certificate of the magistrate or minister to be shown in evidence, is noted; also statutes which elsewhere enhance the value of such testimony.

34. McGaugh v. Mathis, 131 Ark. 221, 198 S. W. 1147; Ewing v. Cox, 158 Ill. App. 25; Witty v. Barham, 147 N. C. 479, 61 S. E. 372; State v. MacRae, 83 N. J. Law, 796, 85 A. 455; Dailey v. Frey, 206 Pa. 227, 55 A. 962; State v. Tillinghast, 25 R. I. 391, 56 A. 181; State v. Walsh, 25 S. D. 30, 125 N. W. 295.

Contra, McArther v. Hopson, 184 Ill. App. 487 (certificate of justice of peace of another State is not of itself enough); Eames v. Woodson, 120 La. 1031, 46 So. 13.

Where a marriage is sought to be proved by the marriage certificate, evidence that the real name of one of the parties differed from the name stated in the marriage certificate was admissable. State v. Thompson, 31 Utah, 228, 87 P. 709.

35. Birt v. Barlow, 1 Doug. 171; Wedgwood's Case, 1 Greenl. 75; Commonwealth v. Norcross, 9 Mass. 492.

36. Bowman v. Little, 101 Md. 273, 61 A. 223, 657.

ister or magistrate has been in the habit of keeping, and which appear to be favorably treated when produced from the proper custody;[37] also the entries in a family Bible, which, if long accessible to members of a family, may carry the weight of family admissions.[38]

§ 1235. Divorce Decree.

A divorce decree is not alone evidence without some evidence of identity of the parties.[39]

§ 1236. Absence of Record of Divorce Claimed.

Lack of divorce may be proved by the absence of court records where they should appear.[40]

§ 1237. Official Character of Person Performing Ceremony.

As for the clergyman or magistrate who performed the marriage, proof of official character is not requisite unless desired, for it is enough that he be a clergyman or magistrate *de facto,* and in the habit of performing the ceremony.[41]

37. Blackburn v. Crawfords, 3 Wall. 175; Kennedy v. Doyle, 10 Allen, 161; Hubbard v. Lee, L. R. 1 Ex. 255; Clark v. St. James' Church, 21 Hun, 95.

38. Weaver v. Leiman, 52 Md. 708; 1 Taylor Ev., § 585.

39. Allen v. McIntosh Lumber Co., 117 Miss. 156, 77 So. 909.

40. Gamble v. Rucker, 124 Tenn. 415, 137 S. W. 499.

41. 1 Bish., § 495; Reg. v. Millis, 10 Cl. & F. 534, 861; State v. Robbins, 6 Ire. 23; State v. Winkley, 14 N. H. 480; State v. Abbey, 29 Vt. 60.

CHAPTER XIX.

PRESUMPTIONS.

SECTION 1238. Presumptions; Kinds of in General.
1239. Presumption of Innocence.
1240. Presumption of Performance of Official Duty.
1241. Presumption Favoring Marriage.
1242. Presumption of Continuance of Life.
1243. Presumption of Common-Law Marriage.
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§ 1238. Presumptions; Kinds of in General.

We now proceed to consider finally the difficult subject of proving a marriage. It is upon presumptions that marriage maintains a legal footing in many instances where actual proof would be difficult, if not impossible. Mr. Bishop states three presumptions in support of marriage, all of which have been incidentally suggested in the preceding sections: I. The presumption of innocence; II. The presumption that official persons have done their duty; III. The general presumption which favors marriage. The first two are of wide application, but the third is peculiar to the present subject.

§ 1239. Presumption of Innocence.

I. The first presumption, that of innocence, we have seen supporting the informal marriage ceremony by words of present or future promise.[42-43] Very essential does it become to the latter; for there, the promise which is put in evidence relating only to the future, innocence, say the authorities, is presumed when copulation follows; or, in other words, the parties are supposed to have exchanged subsequently the requisite words of present promise, else copulation would not have taken place. A weak presumption surely, too favorable for human nature; and if, as at this day would be almost invariably the case in England and America, those words of future promise evidently related to the future celebration of a marriage in form, that presumption breaks down utterly.[44] When a man and woman agree to marry hereafter, are they likely to mean that they will do no more than exchange vows equally private, when custom, statute, and common sense require that a minister or magistrate shall perform the ceremony and give it some publicity? If they do in populous localities, then the woman must be presumed weak either in chastity or in proper regard for the means of defending it.[45]

§ 1240. Presumption of Performance of Official Duty.

II. The second presumption, that official persons have done their duty, especially if penalties are imposed for the violation of that duty, supports the regularity of a ceremonial marriage in compliance with statute, and renders a simple record of marriage after the customary mode, or simple proof that the official person performed the ceremony, *prima facie* evidence that in prerequisites and details all was performed rightly.[46]

42-43. *Supra*, §§ 1174, 1175.

44. *Supra*, § 1175, and cases cited; Peck v. Peck, 12 R. I. 485.

45. See Breadalbane's Case, L. R. 1 H. L. Sc. 182.

46. *Supra*, § 1191; People v. Calder, 30 Mich. 85.

§ 1241. Presumption Favoring Marriage.

III. The third presumption is that the fact of marriage should be favored under all circumstances. *Semper præsumitur pro matrimonio* is the universal maxim of law. If, therefore, a marriage has once been shown, whether directly or by circumstantial evidence, the assumption must be that the marriage was legal and legally performed; and they who seek to prove otherwise have the burden of doing so. Lapse of time strengthens this presumption, which, being in the interest of offspring and of the stability of the marital relation, is in the interest of the public likewise.[47]

§ 1242. Presumption of Continuance of Life.

IV. A fourth presumption, that of life, is mentioned in the extent the effect of the three presumptions already considered. books, which affects the issue of bigamy, and counteracts to some The general rule of law is that where a person — as, for instance, one of the marriage parties — is absent and not heard from during seven years, death should be presumed, but that meantime the presumption is that the life continues. Such presumption is not, however, conclusive; nor can it be said after seven years that the person lived during that whole period, or died at any intermediate date in particular. Circumstances may favor the idea that death occurred much sooner, or much later, or not at all; and, after all, this presumption is chiefly for legal convenience, and to fix the standard of innocence; for should the missing person eventually prove alive, the new marriage or the administration founded upon an erroneous supposition of death falls to the ground.[48]

§ 1243. Presumption of Common-Law Marriage.

To raise a presumption of a common-law marriage the evidence must be clear and convincing.[49]

47. Piers v. Piers, 2 H. L. Cas. 231; cases *post;* De Thoren v. Attorney-General, 1 H. L. App. 686.

48. *Supra,* § 25; Gorman v. State, 23 Tex. 646; Hull v. Rawls, 27 Miss. 471; Reg. v. Lumley, L. R. 1 C. C. 196.

49. Meehan v. Edward Valve & Mfg. Co. (Ind. App.), 117 N. E. 265.

Where parties attempt to make a common-law marriage which is forbidden by statute, and continue to live together after the law is amended and common-law marriages made legal, it will be presumed that they consummated a common-law marriage as soon as the bar was removed.[50]

§ 1244. Presumption of Foreign Ceremonial Marriage.

It is presumed that a ceremony performed in a foreign country is valid.[51]

§ 1245. Presumptions of Valid Marriage.

There is a presumption in favor of the validity of a marriage shown to exist *de facto*,[52] and a marriage will be presumed to have

50. *In re* Biersack, 159 N. Y. S. 519, 96 Misc. 161.

51. Summerville v. Summerville, 31 Wash. 411, 72 P. 84.

52. McGaugh v. Mathis, 131 Ark. 221, 198 S. W. 1147; Estes v. Merrill, 181 S. W. 136; Wilcox v. Wilcox, 171 Cal. 770, 155 P. 95 (whether regular or irregular); *In re* Pusey's Estate, 173 Cal. 141, 159 P. 433 (strong presumption); *In re* Hughson's Estate, 173 Cal. 448, 160 P. 548 (ceremonial marriage); Appeal of Eva (Conn.), 104 A. 238; Farrell v. State, 45 Fla. 26, 34 So. 220; Murchison v. Green, 128 Ga. 339, 57 S. E. 709, 11 L. R. A. (N. S.) 702; Barber v. People, 203 Ill. 543, 68 N. E. 93; Matthes v. Matthes, 198 Ill. App. 515; Bruns v. Cope, — Ind. —, 105 N. E. 471 (strong presumption); Nossaman v. Nossaman, 4 Ind. 648; Haddon v. Crawford, 49 Ind. App. 551, 97 N. E. 811 (regular or irregular); Schubert v. Barnholt, 177 Ia. 232, 158 N. W. 662; Ricard v. Ricard, 143 Ia. 182, 121 N. W. 525; People v. Schoonmaker, 117 Mich. 190, 75 N. W. 439, 5 Det. Leg. N. 177, 72 Am. St. R. 560; *In re* Lando's Estate, 112 Minn. 257, 127 N. W. 1125; Howard v. Kelly, 111 Miss. 285, 71 So. 391 (even common-law marriage); Sullivan v. Grand Lodge, K. P., 97 Miss. 218, 52 So. 360; Wilson v. Burnett, 172 N. Y. S. 673 (whether there are children or not); *In re* Spondre, 162 N. Y. S. 943, 98 Misc. 524. Johannessen v. Johannessen, 128 N. Y. S. 892, 70 Misc. 361; Copeland v. Copeland (Okla.), 175 P. 764; *In re* Saunders' Estate (Okla.), 168 P. 197; Crickett v. Hardin (Okla.), 159 P. 275 (Indian marriage); Ollschlager's Estate v. Widmer, 55 Ore. 145, 105 P. 717; *In re* Hilton's Estate (Pa.), 106 A. 69; Cuneo v. De Cuneo, 24 Tex. Civ. App. 436, 59 S. W. 284; Bull v. Bull, 29 Tex. Civ. App. 364, 68 S. W. 727; Adams v. Wm. Cameron & Co. (Tex. Civ. App.), 161 S. W. 417; Kinney v. Tri-State Telephone Co. (Tex. Civ. App.), 201 S. W. 1180; Thomas v. Thomas, 53 Wash. 297, 101 P. 865.

taken place at the place where the acts relied on as proving a marriage took place.[53]

§ 1246. Legitimacy of Children Favored.

The legitimacy of children is strongly favored in the application of these presumptions, and for their sake even more than their parents. As a matter of proof, a child born in wedlock is taken to be the lawful offspring of the pair, even though the mother were living in adultery at the time of the conception, provided the husband had intercourse with her at the time, or perhaps only access; and whatever the moral probabilities of such a case, neither husband nor wife can testify as to non-access, nor will evidence of unlawful paternity, except the strongest and most conclusive, be allowed to disturb the legal presumption so essential to an innocent child's welfare.[54] So, in general, the presumption in favor of the validity of a marriage appears to be stronger where the legitimacy of children is involved than where property interests alone are in question.[55]

"The presumption thus established by law," observes Lord

See Irving v. Ford, 179 Mass. 216, 60 N. E. 491 (no presumption as to validity of marriage between slaves).

The authority of the officer or clergyman performing the marriage ceremony and all the prerequisites of a valid marriage will be presumed until the contrary is made to appear. *In re* Sloan's Estate, 50 Wash. 86, 96 P. 684.

The presumption of legality arising from a ceremonial marriage, followed by cohabitation of the parties as husband and wife, is founded upon the motives which govern human conduct and upon the policy of our social system. The conclusion of illegality involves the assumption that the parties have exposed themselves to the penal consequences of illegal acts, and operates to bastardize their offspring, and the strength of the presumption increases with the lapse of time through which the parties have cohabited as husband and wife. Sparks v. Ross, 72 N. J. Eq. 762, 65 A. 977.

53. *In re* Tabor, 65 N. Y. S. 571, 31 Misc. 579.

54. Hargrave v. Hargrave, 9 Beav. 552; Phillips v. Allen, 2 Allen, 453; De Thoren v. Attorney-General, 1 H. L. App. 686. But see Cannon v. Cannon, 7 Humph. 410.

55. Goodwin v. Goodwin, 113 Ia. 319, 85 N. W. 31; *In re* Grande's Estate, 141 N. Y. S. 535, 80 Misc. 450; *In re* Biersack, 159 N. Y. S. 519, 96 Misc. 161.

Langdale, "is not to be rebutted by circumstances which only create doubt and suspicion; but it may be wholly removed by proper and sufficient evidence."[56] While, however, a wife cannot, by her evidence, bastardize her own offspring, she is permitted, from the necessity of the case, to prove criminal conversation with a third person, a point collateral to legitimacy and matrimonial access.[57] The presumption is that a child born after the nuptials, of which the mother was pregnant at the time, is the child of the married pair; but, as we have shown, fraud upon an innocent partner may be established instead, by a birth following scandalously soon upon the ceremony, and may afford him ground for seeking to annul the marriage.[58] Proof of cohabitation, however, unaccompanied by reputation of marriage, will not raise a presumption in favor of the legitimacy of offspring.[59]

§ 1247. Cohabitation and Repute.

To apply, now, these combined persumptions for proving a marrioge. Proof of actual marriage is rarely required, except in prosecutions for bigamy and actions for criminal conversation.[60] In other instances a *prima facie* case is made out from cohabitation, reputation, admissions, conduct of the parties, and other like circumstances. For when man and woman live together with constancy as husband and wife, not visiting or receiving one another's visits merely, neither of them occupying apparently the

56. Hargrave v. Hargrave, 9 Beav. 552, 555. That is to say, by evidence of incompetence on the husband's part, absence at the time of conception, etc.

57. Rex. v. Reading, Cas. temp. Hard. 79; Patchett v. Holgate, 15 Jur. 308. On an indictment for adultery, the *particeps criminis* cannot prove the marriage by her testimony. State v. Bowe, 61 Me. 171.

58. Best Ev., 2d ed., 417; *supra*, § 1157.

59. Cargile v. Wood, 63 Mo. 501; Foster v. Hawley, 15 N. Y. Supr. 68.

60. In an action for criminal conversation, and indictments for bigamy or polygamy, the issue tendered is is that one of two cohabitations or acts of commerce is criminal, and the other innocent, and hence stricter proof is requisite than usual. Indictments for adultery, incest, etc., have also been held to require strict proof in a few instances.

station of menial, the presumption arises, all other things being equal, that they are married to one another.[61] This presumption suffices for most controversies where the fact of marriage is put at issue, including questions of legitimacy, of a widow's right of inheritance and dower, and civil cases in general which involve property rights. But cohabitation alone is not sufficient proof of marriage; there must appear a matrimonial cohabitation, and this justified by contemporaneous behavior of the parties, such as should furnish to society the reputation of marriage. Cohabitation and repute go together; and of so much importance does our law regard the judgment formed by acquaintances and kinsfolk on the point of marriage, from their opportunities of observation, that some authorities favor the idea that repute alone would be *prima facie* proof of marriage,[62-63] though in vindication of such repute the cohabitation upon which it is founded ought to be stated besides, that all evidence may be carefully weighed by court and jury as to the main fact of marriage.[64]

Reputation, favorable or unfavorable, is founded on general and not singular opinions, being the social verdict upon the pair, as one may say, and a verdict society rarely fails to give from its means of knowledge. Where reputation is found divided, or the cohabitation is partial and irregular, the virtue of the cohabitation is discredited at once, and the presumption of marriage fails unless strengthened by other means.[65] But it is said that a marriage

61. 2 Greenl. Ev., § 762; Shand v. Gardiner, 6 Eng. Ee. 68; Cunninghams v. Cunninghams, 2 Dow. 482; Budington v. Munson, 33 Conn. 481; Holmes v. Holmes, 6 La. 463; Starr v. Peck, 1 Hill (N. Y.), 270; Miller v. White, 80 Ill. 580; Barnum v. Barnum, 42 Md. 251; Jackson v. State, 8 Tex. App. 60; Proctor v. Bigelow, 38 Mich. 282; Commonwealth v. Stump, 53 Pa. St. 132; Blasini v. Blasini, 30 La. Ann. 1388; Redgrave v. Redgrave, 38 Md. 93; Bowers v. Van Winkle, 41 Ind. 432. Statutes sometimes give this presumption a still wider scope, extending it to all cases, civil or criminal. State v. Armington, 25 Minn. 29; Bish., § 544.

62-63. Fleming v. Fleming, 4 Bing. 266.

64. 1 Greenl. Ev., § 107.

65. See Barnum v. Barnum, 42 Md. 251; Yardley's Estate, 75 Pa. St. 207.

may be established upon the preponderance of repute, although there be repute against the reputed marriage as well as for it.[66]

Nor, after all, do cohabitation and repute afford more than a presumption of marriage; direct evidence that no marriage had been contracted, or even that the man cohabited with two women at the same time, would destroy the inference of virtue; and in every case the presumption of virtue and lawful marriage may be rebutted,[67] but not where a criminal offence is involved in failure

66. Lyle v. Ellwood, L. R. 19 Eq. 98.

67. Goldbeck v. Goldbeck, 3 C. E. Green, 42; Port v. Port, 70 Ill. 484. See *post*, § 1256.

In Jones v. Jones, 45 Md. 144; s. c., 48 Md. 391, it is held, in the case of colored people, that the presumption of a previous marriage from cohabitation and repute is at once overthrown when one of the parties is shown to have married, subsequently, another person in due form while the other party is living. But compare Blanchard v. Lambert, 43 Ia. 228, which presumes rather that a divorce has been procured.

Even though a marriage ceremony with A. be proved on B.'s part, it may be overcome by proof that B. had a prior spouse still living. Emerson v. Shaw, 56 N. H. 418.

Presumption of marriage may be rebutted. Osborne v. McDonald, 159 F. 791; Osborne v. Ramsay, 191 F. 114, 111 C. C. A. 594; Prince v. Edwards, 175 Ala. 532, 57 So. 714; Smith v. People (Colo.), 170 P. 959 (common-law marriage); Klipfel's Estate v. Klipfel, 41 Colo. 40, 92 P. 26; Norman v. Goode, 113 Ga. 121, 38 S. E. 317 (presumption rebutted by proof of a subsequent marriage by one of the parties with a third person); Gorden v. Gorden, 283 Ill. 182, 119 N. E. 312; Hooper v. McCaffery, 83 Ill. App. 371; Compton v. Benham, 44 Ind. App. 51, 85 N. E. 365; Love v. Love (Ia.), 171 N. W. 257; Adkins v. Bently, 177 Ky. 616, 197 S. W. 1086; Jackson v. Claypool, 179 Ky. 662, 201 S. W. 2; Heminway v. Miller, 87 Minn. 123, 91 N. W. 428; Plattner v. Plattner, 116 Mo. App. 405, 91 S. W. 457; Coad v. Coad, 87 Neb. 290, 127 N. W. 455; Sorensen v. Sorensen, 68 Neb. 483, 100 N. W. 930, 103 N. W. 455; Bey v. Bey, 83 N. J. Eq. 239, 90 A. 684; Cramsey v. Sterling, 188 N. Y. 602, 81 N. E. 1162, 97 N. Y. S. 1082, 111 App. Div. 568; *In re* Hinman, 131 N. Y. S. 861, 147 App. Div. 452 (strong presumption); *In re* Grande's Estate, 141 N. Y. S. 535, 80 Misc. 450 (where legitimacy of child involved); *In re* Farley's Estate, 155 N. Y. S. 63, 91 Misc. 185; Fender v. Segro, 41 Okla. 318, 137 P. 103; Linsey v. Jefferson (Okla.), 172 P. 641; Coleman v. James (Okla.), 169 P. 1064; *In re* Callery's Estate, 226 Pa. 469, 75 A. 672 (common-law marriage); Commonwealth v. Haylow, 17 Pa. Super. Ct. 541; Smith v. North Memphis Sav. Bank, 115 Tenn. 12, 89 S. W. 392; *In re* Meade's Estate (W. Va.), 97 S. E. 127; Potter v. Potter, 45 Wash. 401, 88 P. 625; Weather-

to celebrate the marriage in accordance with law.[68] The presumption does not arise where one of them is under a legal disability to marry,[69] and not from secret cohabitation and occasional admissions.[70] The presumption is in favor of the validity of a ceremonial marriage followed by cohabitation as man and wife,[71] and cohabitation and reputation of marriage are competent as tending to show an actual ceremonial marriage,[72] which presumption, how-

all v. Weatherall, 56 Wash. 344, 105 P. 822; Potts v. Potts, 81 Wash. 27, 142 P. 448 (though common-law marriage not recognized). See Weatherall v. Weatherall, 63 Wash. 526, 115 P. 1078 (presumption not strong in case of lewd woman).

68 Summerville v. Summerville, 31 Wash. 411, 72 P. 84.

69 *In re* Morris' Estate, 157 N. Y. S. 472, 92 Misc. 630; Moore v. Moore, 102 Tenn. 148, 52 S. W. 778; *contra*, *In re* Watson's Estate, 161 N. Y. S. 875, 97 Misc. 538 (notwithstanding prohibition in divorce decree against remarriage and though first wife still alive, second marriage presumed legal).

70. Heminway v. Miller, 87 Minn. 123, 91 N. W. 428.

71. Botts v. Botts, 108 Ky. 414, 56 S. W. 961, 22 Ky. Law Rep. 212.

72. Sy Joe Lieng v. Sy Quia, 33 S. Ct. 514, 228 U. S. 335, 57 L. Ed. —; Moore v. Heineke, 119 Ala. 627, 24 So. 374; Farmer v. Towers, 106 Ark. 123, 152 S. W. 993; Posey v. Hanson, 10 App. D. C. 496; Jennings v. Webb, 8 App. D. C. 43; Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451; Gordon v. Gorden, 283 Ill. 182, 119 N. E. 312; Follett v. Illinois Cent. R. Co., 209 Ill. App. 81; Marks v. Marks, 108 Ill. App. 371; *In re* Wittick's Estate, 164 Ia. 485, 145 N. W. 913; Pegg v. Pegg, 138 Ia. 572, 115 N. W. 1027; Bartee v. Edmunds, 29 Ky. Law Rep. 872, 96 S. W. 535; Caldwell v. Williams (Ky., 1909), 118 S. W. 932; Pope v. Missouri Pac. Ry. Co., 175 S. W. 955; Bishop v. Brittain Inv. Co., 229 Mo. 699, 129 S. W. 668 (deeds admissible to show man a bachelor); Plattner v. Plattner, 116 Mo. App. 405, 91 S. W. 457; Forbes v. Burgess, 158 N. C. 131, 73 S. E. 792; Dietrich v. Dietrich, 112 N. Y. S. 968, 128 App. Div. 564; Linsey v. Jefferson (Okla.), 172 P. 641; Williams v. Herrick, 21 R. I. 401, 43 A. 1036, 79 Am. St. R. 809 (reputation must be general and uniform); Cave v. Cave, 101 S. C. 40, 85 S. E. 244; Berger v. Kirby, 153 S. W. 1130, affg. judg. (Civ. App.), 135 S. W. 1122; Cuneo v. De Cuneo, 24 Tex. Civ. App. 436, 59 S. W. 284 (addresses of letters written her are admissible to show general reputation); Jordan v. Johnson (Tex. Civ. App.), 155 S. W. 1194; Schwingle v. Keifer (Tex. Civ. App., 1911), 135 S. W. 194 (reputation may be proved by persons not members of family).

In a criminal proceeding for criminal conversation reputation of marriage is no defence. Frederick v.

ever, may be rebutted by evidence of oral and written statements of one of the parties though not in the presence of the other denying the marriage.[73]

§ 1248. Family Repute.

General repute in a family, proved by surviving members of it, is admissible upon a question of marriage or pedigree.[74]

§ 1249. Reputation of Parties.

On the issue of a common-law marriage it may be shown that the woman was a prostitute, but not that she had a reputation as being a prostitute.[75]

§ 1250. Presumption Where Relations Illicit in Inception.

Where relations between a man and woman were illicit in their inception the presumption is that they continued as illicit, in the absence of evidence of a marriage,[76] but the presumption that an

Morse, 88 Vt. 126, 92 A. 16; Weatherall v. Weatherall, 56 Wash. 344, 105 P. 822. See *In re* Svendsen's Estate, 37 S. D. 353, 158 N. W. 410.

73. *In re* Imboden's Estate, 111 Mo. App. 220, 86 S. W. 263.

74. Barnum v. Barnum, 42 Md. 251; *Ib.*

75. Warren v. Canard, 30 Okla. 514, 120 P. 599.

76. Darling v. Dent, 82 Ark. 76, 100 S. W. 747; Klipfel's Estate v. Klipfel, 41 Colo. 40, 92 P. 26; Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451; Gorden v. Gorden, 283 Ill. 182, 119 N. E. 312; Bellinger v. Devine, 269 Ill. 72, 109 N. E. 666; Robinson v. Ruprecht, 191 Ill. 424, 61 N. E. 631; Pike v. Pike, 112 Ill. App. 243; Marks v. Marks, 108 Ill. App. 371; Compton v. Benham, 44 Ind. App. 51, 85 N. E. 365; Keen v. Keen, 184 Mo. 358, 83 S. W. 526, 201 U. S. 319, 26 S. Ct. 494, 50 L. Ed. 772; Howard v. Kelly, 111 Miss. 285, 71 So. 391; Dietrich v. Dietrich, 112 N. Y. S. 968, 128 App. Div. 564; Bell v. Clarke, 92 N. Y. S. 163, 45 Misc. 272; United States Trust Co. v. Maxwell, 57 N. Y. S. 53, 26 Misc. 276; Moller v. Sommer, 149 N. Y. S. 103, 86 Misc. 110, 150 N. Y. S. 1097; Spencer v. Spencer, 147 N. Y. S. 111, 84 Misc. 264; Wilson v. Burnett, 172 N. Y. S. 673; *In re* Eichler, 146 N. Y. S. 846, 84 Misc. 667; McBean v. McBean, 37 Ore. 195, 61 P. 418; *In re* Fuller's Estate, 250 Pa. 78, 95 A. 382; *In re* Patterson's Estate, 237 Pa. 24, 85 A. 75; Commonwealth v. Gamble, 36 Pa. Super. Ct. 146; Henry v. Taylor, 16 S. D. 424, 93 N. W. 641; *In re* Svendsen's Estate, 37 S. D. 353, 158 N. W. 410; Eldred v. Eldred, 97 Va. 606, 34 S.

illicit relation continued as such may be rebutted by evidence of an actual marriage between the parties.[77] If a particular marriage celebration is set up to overcome the unfavorable presumption arising from illicit connection, that particular marriage should be proved.[78]

The presumption in favor of decency and virtue may be overcome, therefore, by counter-presumption. And as a cohabitation illicitly begun is presumed to so continue until proof of change, a marriage will not, in England or most parts of the United States, be presumed from such cohabitation and repute, unless something open and unequivocal, like a legal marriage ceremony, upon fit opportunity, puts both parties in a virtuous relation. But States and countries, if there be such, which favor informal marriage, instead of requiring ceremonies, might show, by way of presumption, more favor in this respect.[79]

§ 1251. Presumption of Continuance of Marriage.

A marriage shown to exist is presumed to continue in the absence of other evidence[80] which presumption is disputable and

E. 477; Rockcastle Mining, Lumber & Oil Co. v. Baker, 167 Ky. 66, 179 S. W. 1070 (may presume marriage from cohabitation for long period although relations illicit in inception). See Bishop v. Brittain Inv. Co., 229 Mo. 699, 129 S. W. 668 (where relations platonic till death of first wife, no presumption that illicit).

77. Drawdy v. Hesters, 130 Ga. 161, 60 S. E. 451; Schaffer v. Krestovnikow (N. J.), 105 A. 239.

78. Barnum v. Barnum, 42 Md. 251.

79. See Floyd v. Calvert, 53 Miss. 37; Duncan v. Duncan, 10 Ohio St. 181; Barnum v. Barnum, 42 Md. 251; *supra*, § 1169 *et seq.*

See Breadalbane's Case, L. R. 1 H. L. Sc. 182, where the subject is discussed with some bias in this direction. In Collins v. Collins, 80 N. Y. 1, even where marriage under a disability was believed by a woman to be lawful, cohabitation subsequent to the removal of the disability, and in reliance simply upon the void marriage, was held insufficient.

80. Nelson v. Jones, 245 Mo. 579, 151 S. W. 80; Duff v. Duff, 156 Mo. App. 247, 137 S. W. 909 (one unmarried when he disappeared is presumed to remain so); *In re* Caltabellotta's Will, 171 N. Y. S. 82, 183 App. Div. 753; State v. Eggleston, 45 Ore. 346, 77 P. 738; Summerhill v. Darrow, 94 Tex. 71, 57 S. W. 942; Hilliard v. Wisconsin Life Ins. Co., 137 Wis. 208, 117 N. W. 999.

will give way to a higher presumption.[81] The presumption in favor of the continuance of a marriage will usually give way to a presumption in favor of the validity of a second marriage,[82] but where successive marriages occur the presumption in favor of the legality of each is equal and an actual marriage must be established by proof.[83]

§ 1252. Presumption of Dissolution of Prior Marriage.

It will be presumed that where parties live openly together as husband and wife for many years a prior marriage of one of them to a third party has been dissolved by death or divorce[84] and mere proof of a prior marriage of one of the parties will not overcome

81. *In re* Baldwin's Estate, 162 Cal. 471, 123 P. 267.

As between a nonceremonial unwitnessed marriage, attempted to be established by repute and the declarations of the deceased man, and the later formal marriage ceremony between the man and another woman, of which marriage there was issue, presumptions will not be indulged, but the issue will be decided on the evidence. *In re* Rossignot's Will, 112 N. Y. S. 353.

82. United States v. Green, 98 F. 63; Murchison v. Green, 128 Ga. 339, 57 S. E. 709, 11 L. R. A. (N. S.) 702; *In re* Meehan's Estate, 135 N. Y. S. 723, 150 App. Div. 681; *contra*, Goodwin v. Goodwin, 113 Ia. 319, 85 N. W. 31 (where property rights involved).

83. Staley v. State, 87 Neb. 539, 127 N. W. 878.

84. McLaughlin v. McLaughlin (Ala.), 78 So. 388; Goset v. Goset, 112 Ark. 47, 164 S. W. 759; Town of Roxbury v. Town of Bridgewater, 85 Conn. 196, 82 A. 193; State v. Collins (Del. Gen. Sess.), 99 A. 87; Hager v. Brandt, 111 Ia. 746, 82 N. W. 1016; Lyon v. Lash, 79 Kan. 342, 99 P. 598; Scott's Adm'r v. Scott, 25 Ky. Law Rep. 1356, 77 S. W. 1122; Schaffer v. Richardson's Estate, 125 Md. 88, 93 A. 391; *In re* FitzGibbon's Estate, 17 Det. Leg. N. 607, 127 N. W. 313; Price v. Tompkins, 171 N. Y. S. 844, 172 N. Y. S. 915; Lazarowicz v. Lazarowicz, 154 N. Y. S. 107, 91 Misc. 116; Hale v. Hale, 40 Okla. 101, 135 P. 1143; Chancey v. Whinnery, 147 P. 1036; Coachman v. Sims, 36 Okla. 536, 129 P. 845; *In re* Hilton's Estate (Pa.), 106 A. 69. See Succession of Thomas (La.), 80 So. 186 (no presumption of good faith of woman of mature years who marries a man whom she knows to be already married depending on his mere statement of a divorce); *contra, In re* Stanton, 123 N. Y. S. 458 (where by statute no second marriage shall be made during life of first spouse unless he is sentenced to jail for life). See learned note in 30 Harvard Law Review, 500.

the presumption in favor of the validity of the second marriage.[85] A second marriage raises no presumption that a first marriage was illegal,[86] and in the absence of other evidence it will be presumed that a prior marriage has been dissolved and that a second marriage is legal,[87] but the presumption does not arise where it appears that one deserted his former wife without cause[88] or where there is positive evidence that the prior divorce does not

85. Lewis v. Lewis (Okla.), 158 P. 368.

86. Hallums v. Hallums, 74 S. C. 407, 54 S. E. 613.

87. McGaugh v. Mathis, 131 Ark. 221, 198 S. W. 1147; McCord v. McCord, 13 Ariz. 377, 114 P. 968; *In re* Hughes (Cal.), 160 P. 548; Lampkin v. Travelers' Ins. Co., 11 Colo. App. 249, 52 P. 1040; Huff v. Huff, 20 Ida. 450, 118 P. 1080; Winter v. Dibble, 251 Ill. 200, 95 N. E. 1093; Boulden v. McIntyre, 119 Ind. 574, 21 N. E. 445, 12 Am. St. R. 453; Parsons v. Grand Lodge A. O. U. W. of Ia., 108 Ia. 6, 78 N. W. 676; Smith v. Fuller, — Ia. —, 108 N. W. 765; Shepard v. Carter, 86 Kan. 125, 119 P. 533; Howton v. Gilpin, 24 Ky. Law Rep. 630, 69 S. W. 766; Jones v. Squire, 137 La. 883, 69 So. 733; Killackey v. Killackey, 156 Mich. 127, 120 N. W. 680, 16 Det. Leg. N. 73; Maier v. Brock, 222 Mo. 74, 120 S. W. 1167; Same v. Waters, 222 Mo. 102, 120 S. W. 1174 (prior marriage in foreign country presumed annulled); Jackson v. Phalen, 237 Mo. 142, 140 S. W. 879; Same v. Phelan, 237 Mo. 153, 140 S. W. 882; Aldridge v. Aldridge (Miss.), 77 So. 150; Howard v. Kelly, 111 Miss. 285, 71 So. 391; Alabama & V. Ry. Co. v. Beardsley, 79 Miss. 417, 30 So. 660, 89 Am. St. R. 660; Ross v. Sparks, 83 A. 118, 79 N. J. Eq. 649, affg. order (Ch.), Sparks v. Ross, 79 N. J. Eq. 99, 80 A. 932; *In re* Biersack, 159 N. Y. S. 519, 96 Misc. 161; Zimmerman v. Holmes (Okla.), 159 P. 303; James v. Adams (Okla.), 155 P. 1121 (where former wife living a divorce is presumed); *In re* Thewlis' Estate, 217 Pa. 307, 66 A. 519; *In re* Wile's Estate, 6 Pa. Super. Ct. 435; Gamble v. Rucker, 124 Tenn. 415, 137 S. W. 499; Tanton v. Tanton (Tex. Civ. App.), 209 S. W. 429; Kinney v. Tri-State Telephone Co. (Tex. Civ. App.), 201 S. W. 1180; Wingo v. Rudder (Tex. Civ. App., 1909), 120 S. W. 1073 (although one party to first marriage obtains divorce after remarriage of the other).

Where a married man disappeared and was not heard from for seven years, and his wife married again within that time although there is no presumption as to the date of the death of the absent husband, still it will be presumed that he was dead at the time of the second marriage and that this marriage is valid. *In re* McCausland's Estate, 213 Pa. 189, 62 A. 780, 110 Am. St. R. 540.

88. *In re* Colton's Estate, 129 Ia. 542, 105 N. W. 1008; Palmer v. Palmer, 162 N. Y. 130, 56 N. E. 501, 50 N. Y. S. 1131, 27 App. Div. 632.

exist.[89] There is much confusion in the authorities but usually evidence that no divorce was procured by either party in the jurisdiction where either of them lived may overcome the presumption in favor of the subsequent marriage of one of them,[90] while in New York it seems to be held that if the presumption of divorce is rebutted a presumption that the first marriage was annulled will take its place.[91] Even evidence that a widow had an undivorced husband living in a foreign country may be insufficient to rebut the presumption of the validity of the second marriage.[92]

The burden is upon a person who asserts the illegality of a marriage to prove such illegality and where a second marriage is shown as a fact a strong presumption exists in favor of its legality which is not overcome by mere proof of a prior marriage and that the wife had not obtained a divorce before her second marriage. The parties attacking such second marriage have the burden of proof to show that neither party to the first marriage had obtained a divorce.[93]

The usual presumption where a marriage is proven is that such matrimonial relation continued in the absence of evidence of death or divorce. But where both parties marry again in consequence of a statement of the husband that he has obtained a divorce and both parties subsequently live with new partners for many years the presumption mentioned is outweighed by the stronger presumption of innocence and morality, and of the validity of a second marriage solemnized according to law. When a second marriage has been entered into in good faith and all parties have acted on the assumption that the first is no longer in force, the natural inference and the prevailing presumption is that no legal impedi-

89. Succession of Thomas (La.), 80 So. 186.

90. Smith v. Fuller, 138 Ia. 91, 115 N. W. 912; *In re* Colton's Estate, 129 Ia. 542, 105 N. W. 1008. See *In re* Salvin's Will, 173 N. Y. S. 897 (complete chain of evidence showing continuance of first marriage is necessary to overcome presumption of validity of second marriage).

91. Lazarowicz v. Lazarowicz, 154 N. Y. Supp. 107, 91 Misc. 116.

92. Schubert v. Barnholt, 177 Ia. 232, 158 N. W. 662.

93. Jones v. Jones (Okla.), 164 P. 463, L. R. A. 1917E, 921.

ment existed to entering into the new matrimonial relation and those who seek to impeach the second marriage take upon themselves the burden of showing that the first has not been dissolved.[94]

Some States, however, do not recognize the presumption of divorce as terminating the first marriage[95] and others will not entertain the presumption in the absence of a foundation in fact where the spouse has not shown by his behavior that the marriage was terminated.[96]

In an action by one claiming to be the widow of the deceased for his death, she sustains the burden of proof by showing that she was married to the deceased in Tennessee, that he deserted her and that she never heard of him again although after seven years absence supposing him dead she married again. It further appeared that he had married again in Alabama. The court refuses to indulge in any presumption that the second marriage was legal or that the deceased had obtained a valid divorce, no notice of any proceedings ever having been served on the plaintiff, and the court remarks that no divorce obtained by substituted service without actual notice would be valid anyway.[97]

§ 1253. Lack of Record.

There is no presumption from a lack of record of a marriage that no marriage was solemnized.[98]

94. Shepard v. Carter, 86 Kan. 125, 119 P. 533, 38 L. R. A. (N. S.) 568.

95. Randlett v. Rice, 141 Mass. 385, 6 N. E. 238; Williams v. Williams, 63 Wis. 58, 23 N. W. 110.

96. *In re* Colton, 129 Ia. 542, 105 N. W. 1003.

97. Neely v. Tennessee G. & A. R. Co. (Ga.), 89 S. E. 325, L. R. A. 1916F, 819.

98. Galveston H. & S. A. Ry. Co. v. Cody, 20 Tex. Civ. App. 520, 50 S. W. 135; Clayton v. Haywood (Tex. Civ. App., 1911), 133 S. W. 1082 (records destroyed by fire).

The fact that a Russian army officer selects a priest of the Russian church to perform the ceremony raises the presumption that he is a Greek Orthodox although this makes the marriage to a Jewess invalid. Schaffer v. Krestovnikow (N. J. Ch.), 102 A. 246.

§ 1254. Secret Marriages.

There is a presumption against the validity of secret marriages.[99]

§ 1255. Removal of Impediment to Marriage.

Where persons desiring to marry enter into an illicit relationship when one of them is incompetent to marry and the obstacle is removed their continued cohabitation raises a presumption of a marriage immediately after the impediment is removed.[1]

§ 1256. Rebuttal of Presumptions.

The presumption of a marriage arising by cohabitation may be rebutted by evidence of facts inconsistent therewith[2] but the rebutting evidence must be strong and conclusive[3] as evidence of separation of the parties[4] and the marriage of one of them to another or by other direct evidence.[5]

Positive evidence of non-assent to an irregular marriage weighs against the presumption of its validity.[6]

99. Sorensen v. Sorensen, 68 Neb. 483, 100 N. W. 930, 103 N. W. 455.

1. Adger v. Ackerman, 52 C. C. A. 568, 115 F. 124; Marzette v. Cronk, 141 La. 437, 75 So. 107 (slaves emancipated); Parker v. De Bernardi (Nev.), 164 P. 645; Knecht v. Knecht (Pa.), 104 A. 676.

2. *In re* Elliott's Estate, 165 Cal. 339, 132 P. 439 (where only attempt at marriage was void); Klipfel's Estate v. Klipfel, 41 Colo. 40, 92 P. 26; Eames v. Woodson, 120 La. 1031, 46 So. 13; Le Suer v. Le Suer, 122 Minn. 407, 142 N. W. 593 (conduct of parties); Penney v. St. Joseph Stockyards Co., 212 Mo. 309, 111 S. W. 79; *In re* Reinhardt's Estate, 160 N. Y. S. 828, 95 Misc. 413; *In re* Meade's Estate (W. Va.), 97 S. E. 127; Nelson v. Carlson, 48 Wash. 651, 94 P. 477. See *ante*, § 1247.

3. Matthes v. Matthes, 198 Ill. App. 515; Schaffer v. Krestovnikow (N. J. Ch.), 102 A. 246.

4. *In re* Wallace's Estate, 40 Pa. Super Ct. 595; Moore v. Heineke, 119 Ala. 627, 24 So. 374; *In re* Campbell's Estate, 108 P. 669, 12 Cal. App. 707, reh. den. (Sup.), 12 Cal. App. 707, 108 P. 676; Pittinger v. Pittinger, 28 Colo. 308, 64 P. 195, 89 Am. St. R. 193; *In re* Maher's Estate, 183 Ill. 61, 56 N. E. 124; Hooper v. McCaffery, 83 Ill. App. 341. See Smith v. Fuller, — Ia. —, 108 N. W. 765.

5. Adair v. Mette, 156 Mo. 496, 57 S. W. 551.

6. Kopke v. People, 43 Mich. 41, 4 N. W. 551; *In re* Torrence's Estate,

Presumptions arising from the acts of the parties will be controlled by direct evidence of what the marriage was,[7] and the presumption from reputation will not disprove an actual marriage.[8]

§ 1257. Burden of Proof.

The burden of proof as to marriages is so governed by the presumptions treated in the prior sections of this chapter that the subject may well be treated here. The presumptions as to marriages in ordinary cases place the burden of proof on those who deny the effect of the presumptions. For example, the burden is on one who asserts the illegality of a marriage,[9] even of one who had been married previously.[10] The burden of impeaching a new marriage on the ground of the old lies on the impeaching party, and the conviction of the guilty bigamist has nothing to do with the case.[11] But, as Mr. Justice Wayne once observed, prudence

47 Pa. Super. Ct. 509 (evidence that woman stood mute during ceremony does not show refusal of assent). See People v. Loomis, 106 Mich. 250, 64 N. W. 18.

7. McKenna v. McKenna, 180 Ill. 577, 54 N. E. 641, 73 Ill. App. 64.

8. Peet v. Peet, 52 Mich. 464, 18 N. W. 220.

9. Cash v. Cash, 67 Ark. 278, 54 S. W. 744; *In re* Pusey's Estate, 173 Cal. 141, 159 P. 433 (1909); Reifschneider v. Reifschneider, 241 Ill. 92, 89 N. E. 255, affg. judg. (1908), 144 Ill. App. 119; Senge v. Senge, 106 Ill. App. 140; Butterfield v. Ennis, 193 Mo. App. 638, 186 S. W. 1173; *In re* Simms' Estate, 172 N. Y. S. 670 (where ceremony performed).

10. Bell v. Bell, 196 Ala. 465, 71 So. 465; *In re* Hughson's Estate, 173 Cal. 448, 160 P. 548; Potter v. Clapp, 203 Ill. 592, 68 N. E. 81, 96 Am. St. R. 322; Franklin v. Lee, 30 Ind. App. 31, 62 N. E. 78; Turner v. Williams, 202 Mass. 500, 89 N. E. 110; Alabama & V. Ry. Co. v. Beardsley, 79 Miss. 417, 30 So. 660, 89 Am. St. R. 660; *In re* Rash's Estate, 21 Mont. 170, 53 P. 312, 69 Am. St. R. 649; *In re* Biersack, 159 N. Y. S. 519, 96 Misc. 161 (must show that both parties to former marriage were competent to marry); Copeland v. Copeland (Okla.), 175 P. 764; Thomas v. James (Okla.), 171 P. 855; Jones v. Jones (Okla.), 164 P. 463; Lewis v. Lewis (Okla.), 158 P. 368 (must prove that neither party to first marriage obtained a divorce); Kinney v. Tri-State Telephone Co. (Tex. Civ. App.), 201 S. W. 1180; Goldwater v. Burnside, 22 Wash. 215, 60 P. 409. See *In re* Gerlach's Estate, 60 N. Y. S. 574, 29 Misc. 90 (decree of divorce prohibiting remarriage alters burden).

11. Patterson v. Gaines, *supra;* 1 Bish., § 299.

and delicacy impose such restraints until the fact is so generally known as not to be a matter of doubt, or until the former marriage "has been impeached in a judicial proceeding, wherever that may be done."[12] So the burden is on one who asserts the legality of a marriage where the relations between the parties were adulterous in their origin[13] and is on one who would set up the legality of a secret marriage of which no record was made,[14] but the burden is on one denying the legality of a foreign marriage.[15]

Where a marriage takes place of one under the age of consent the burden is on one claiming ratification to prove it.[16]

The burden of proof mentioned in these cases is really the burden of going forward with evidence in cases where the presumptions furnish a *prima facie* case and require the other side to meet it in some way. This must not be confused with the burden of proving one's case, strictly speaking, as this is a burden which no presumption can shift. There are many cases where evidence of a marriage is a necessary part of the plaintiff's case, and there the plaintiff must prove it. For example, one who has the burden of proving the legitimacy of a child has the burden also of proving the validity of the marriage of its parents,[17] and the burden is on one claiming to be the widow of deceased,[18] or heir, to prove marriage.[19]

12. Patterson v. Gaines, 6 How. U. S. 550. A cause of action to annul a marriage by reason of a former marriage ought not to be joined with causes relative to matrimonial property. Uhl. v. Uhl, 52 Cal. 250.

13. Nossaman v. Nossaman, 4 Ind. 648; Tedder v. Tedder, 108 S. C. 271, 94 S. E. 19.

14. Wilson v. Allen, 108 Ga. 275, 33 S. E. 975.

15. Franklin v. Lee, 30 Ind. App. 31, 62 N. E. 78; Lanctot v. State, 98 Wis. 136, 73 N. W. 575.

16. Americus Gas & Electric Co. v. Coleman, — Ga. App. —, 84 S. E. 493.

17. Lynch v. Knoop, 118 La. 611, 43 So. 252, 8 L. R. A. (N. S.) 480.

18. *In re* Reinhardt's Estate, 160 N. Y. S. 828, 95 Misc. 413; *In re* Davis' Estate, 204 Pa. 602, 54 A. 475.

19. Gorden v. Gorden, 283 Ill. 182, 119 N. E. 312.

CHAPTER XX.

WHAT LAW GOVERNS MARRIAGE.

SECTION 1258. Common Law.
1259. Statutory Provisions.
1260. Law When Celebrated Governs.
1261. Law Where Celebrated Governs.
1262. Marriages in Violation of Public Policy.
1263. Law of Domicile.
1264. Marriage by Mail.
1265. Prohibition on Remarriage in Divorce Decree.
1266. Leaving State to Evade Its Laws.

§ 1258. Common Law.

In the absence of statute the validity of marriages will be governed by the common law.[20]

§ 1259. Statutory Provisions.

Statutory provisions as to marriages refer usually only to marriages in the State.[21]

§ 1260. Law When Celebrated Governs.

A marriage valid by the law governing both parties when made will be recognized everywhere[22] if valid by the law in force where it was performed.[23]

§ 1261. Law Where Celebrated Governs.

Marriage is favored beyond ordinary contracts in all nations. It is an old and well-recognized rule (subject, as we shall see,

20. Riddle v. Riddle, 26 Utah, 268, 72 P. 1081; Lemons v. Harris, 115 Va. 809, 80 S. E. 740. See *ante*, § 1169.

21. Whippen v. Whippen, 171 Mass. 560, 51 N. E. 174; Snuffer v. Karr, 197 Mo. 182, 94 S. W. 983; *Ex parte* Chace, 26 R. I. 351, 58 A. 978, 69 L. R. A. 493.

22. Kobogum v. Jackson Iron Co., 76 Mich. 498, 43 N. W. 602.

23. Stewart v. Vandervort, 34 W. Va. 524, 12 S. E. 736, 12 L. R. A. 50.

however, to some exceptions) that a marriage lawful where celebrated is lawful everywhere; and that a marriage unlawful where celebrated is unlawful everywhere.[24] This rule, public policy, common morality, and the comity of nations demand shall be enforced. Even when parties leave their own State or country, for the express purpose of evading the legal requirements, marry abroad, and then return, the marriage is to be sustained, unless, at all events, fundamental essentials have been thereby disregarded. This doctrine was very liberally applied in England, when the famous Gretna Green method of union was pronounced indissoluble.[25] So in this country, where persons disqualified by the laws of their own State cross over into another.[26]

In all such cases the principle of ordinary contracts is disregarded, and the *lex loci contractûs* is permitted to prevail over the *lex domicilii.* But this doctrine, although favored by most writers on public law, has not received their unanimous support. Huberus, a continental jurist, maintained — contrary to the view afterwards expressed in *Compton* v. *Bearcroft,* by the English courts — that where parties go to a foreign country, in order to evade their own laws which require the assent of parent or guardian, their marriage should be deemed invalid; for, he observes, such acts tend *ad eversionem juris,* and should not be encouraged.[27] This opinion finds favor in France and Holland. And there is a statute in

24. Story Confl. Laws, §§ 79-81; 2 Kent Com. 91; Scrimshire v. Scrimshire, 2 Hag. Con. 395; Harford v. Morris, 2 Hag. Con. 423; Lord Tenterden, in Lacon v. Higgins, 3 Starkie's N. P. Cases, 178; Simonin v. Mallac, 2 Swab. & T. 67.

25. Compton v. Bearcroft, Bul. N. P. 114; 2 Hag. Con. 443. Where parties married in Scotland, and went through a second marriage ceremony in Belgium, a Belgian divorce which purported to affect the Belgian marriage alone was held to leave the Scotch marriage subsisting. Birt v. Boutinez, L. R. 1 P. & D. 487.

26. Stevenson v. Gray, 17 B. Monr. 193; 1 Bish. Mar. & Div., 5th ed., § 355, and American cases cited.

27. De Conflictu Legum, § 8. See other authorities cited to the same conclusion in Story Confl. Laws, § 123. Chancellor Kent intimates his disapproval of the doctrine of Compton v. Bearcroft. Note to 2 Kent Com. 91. Burge, in 1 Col. & For. Laws, 194, attempts to reconcile the views of Huberus with the English rule.

Massachusetts to the same purport.[28] But *Compton* v. *Bearcroft* is good law in England and most parts of the United States.[29]

The validity of a marriage depends on the law of the place where the ceremony was performed,[30] and a marriage void where made will be void even in a jurisdiction which would recognize its validity if celebrated there.[31] Thus failure to comply with the

28. See Commonwealth v. Hunt, 4 Cush. 49.

29. Swift v. Kelly, 3 Knapp, 257; Morgan v. MeGhee, 5 Humph. 13; Wall v. Williamson, 8 Ala. 48; Patterson v. Gaines, 6 How. (U. S.) 550; Phillips v. Gregg, 10 Watts, 158; Fornstill v. Murray, 1 Bland, 479.

30. Hastings v. Douglass (U. S. D. C., W. Va.), 249 F. 378; Darling v. Dent, 82 Ark. 76, 100 S. W. 747 (common-law marriage); Tyler v. Andrews, 40 App. D. C. 100; Petras v. Petras (Del. Super.), 105 A. 835; Whittington v. MeCaskill, 65 Fla. 162, 61 So. 236; Hilton v. Stewart, 15 Ida. 150, 96 P. 579; Lyon v. Lyon, 230 Ill. 366, 8 N. E. 850, 13 L. R. A. (N. S.) 996; Same v. Barney, 132 Ill. App. 45; Laurence v. Laurence, 164 Ill. 367, 45 N. E. 1071; Reifsehneider v. Reifsehneider, 241 Ill. 92, 89 N. E. 255, affg. judg. (1908), 144 Ill. App. 119; Powell v. Powell (Ill.), 118 N. E. 786, 207 Ill. App. 292; Canale v. People, 177 Ill. 219, 52 N. E. 310; Nehring v. Nehring, 164 Ill. App. 527; Fensterwald v. Burk, 129 Md. 131, 98 A. 358 (between uncle and niece); Kapigian v. Der Minassian, 212 Mass. 412, 99 N. E. 264 (upholding Turkish law); *In re* Lando's Estate, 112 Minn. 257, 127 N. W. 1125; McHenry v. Brackin, 93 Minn. 510, 101 N. W. 960; Henderson v. Ressor, 265 Mo. 718, 178 S. W. 175; Banks v. Galbraith, 149 Mo. 529, 51 S. W. 105 (Indian woman); Hills v. State, 61 Neb. 589, 85 N. W. 836, 57 L. R. A. 155; Donohue v. Donohue, 116 N. Y. S. 241, 63 Mise. 111; Vazakas v. Vazakas, 109 N. Y. S. 568; *In re* Spondre, 162 N. Y. S. 943, 98 Misc. 524; Davidson v. Ream, 161 N. Y. S. 73, 97 Mise. 89; Earle v. Earle, 126 N. Y. S. 317; Reid v. Reid, 129 N. Y. S. 529, 72 Misc. 214; *In re* Hall, 70 N. Y. S. 406, 61 App. Div. 266; *In re* Kutter's Estate, 139 N. Y. S. 693, 79 Misc. 74; Reaves v. Reaves, 15 Okla. 240, 82 P. 490, 2 L. R. A. 353 (common-law marriage); Sturgis v. Sturgis, 51 Ore. 10, 93 P. 696; Ollschlager's Estate v. Widmer, 55 Ore. 145, 105 P. 717; *In re* McCausland's Estate, 213 Pa. 189, 62 A. 780, 110 Am. St. R. 540 (common-law marriage); Schofield v. Schofield, 51 Pa. Super. Ct. 564; Thompson v. Thompson (Tex. Civ. App.), 202 S. W. 175, 203 S. W. 939; State v. Shattuck, 69 Vt. 403, 38 A. 81, 40 L. R. A. 428, 60 Am. St. R. 936; Miller v. Miller, 85 S. E. 542; Nelson v. Carlson, 48 Wash. 651, 94 P. 477 (common-law marriage); Kitzman v. Kitzman, 167 Wis. 308, 166 N. W. 789; Hall v. Industrial Commission, 165 Wis. 364, L. R. A. 1917D, 829, 162 N. W. 312.

31. Jordan v. Missouri & Kansas Telephone Co., 136 Mo. App. 192, 116

requirements of foreign statutes will render a marriage performed in a foreign country void.[32]

A marriage invalid where celebrated is as a rule invalid everywhere. But this principle, being unfavorable to marriage, is applied with more hesitation than its converse.[33] Citizens sojourning abroad, parties made amenable to the general laws of another country and yet retaining customs of their own, *quasi* foreigners who do not forfeit their original allegiance, often have special privileges shown them by the comity of nations. Thus, Protestants in a Roman Catholic country have been allowed to marry after their own forms.[34] Settlers from foreign parts are often permitted to take their national customs with them.[35] There are statutes, both in Great Britain and the United States, which permit citizens to marry abroad in presence of certain accredited representatives of their government, as ministers and consuls; and such marriages are considered lawful, though one of the parties be a foreigner.[36] Even a marriage contracted on board a vessel on the high seas may be presumed to be of international validity,

S. W. 432; Schaffer v. Krestovnikow (N. J. Ch.), 102 A. 246 (Russian marriage between Christian and non-Christian).

32. Ferrie v. Public Administrator, 3 Bradf. Sur. (N. Y.) 151; *In re* Hall, 70 N. Y. S. 406, 61 App. Div. 266; Miller v. Miller, 128 N. Y. S. 787, 70 Misc. 368.

33. Lord Stowell, in Ruding v. Smith, 2 Hag. Con. 371; 4 Eng. Ec. 551, 560.

34. But this seems permitted only on the assumption that the local law disqualifies. Kent v. Burgess, 11 Sim. 361; Lord Eldon, in Lord Cloncurry's Case; Cruise on Dignities, 276. The positive illegality of marriage between a Catholic and Protestant at the place of marriage is not favored; presumptions are to the contrary. Commonwealth v. Kenney, 120 Mass. 387; Philadelphia v. Williamson, 10 Phila. 176. Presumptions favor marriage generally. See *supra*, §§ 38, 39.

35. See Ruding v. Smith, 2 Hag. Con. 371; Story Confl. Laws, § 2 *a*.

36. Lloyd v. Petigean, 2 Curt. Ec. 251; 7 Eng. Ec. 105; Loring v. Thorndike, 5 Allen, 257; 12 U. S. Stats. at Large, 79; 1860, ch. 179, § 31. Invading armies carry the matrimonial law of their domicile with them. Ruding v. Smith, 2 Hag. Con. 371; Lord Ellenborough, in Rex v. Brampton, 10 East, 282.

and should be upheld if possible.[37] Whatever may be pronounced by the courts, in the adopted country of an emigrant, a marriage lawful by the laws of his native land would in his native land generally be upheld, if he had not forfeited his allegiance. And the burden of proof is on whoever affirms the illegality of a marriage between suitable parties which was solemnized abroad.[38]

§ 1262. Marriages in Violation of Public Policy.

The only exception to this rule of the *lex loci* is that marriages prohibited by public policy in the State where they are brought in question will not be upheld though valid where celebrated.[39] For example, the court has a right to annul a marriage between its citizens under the age of consent although celebrated outside the State in a jurisdiction where it was valid,[40] and a marriage in a foreign country recognized by its laws, but void here as being incestuous, will not be recognized in this country;[41] but a marriage between relatives valid in the State where made may be

37. Hynes v. McDermott, 82 N. Y. 41.

38. *Ib.;* Redgrave v. Redgrave, 38 Md. 93. And see Blumenthal v. Tannenholz, 31 N. J. Eq. 194. See, also, as to the conflict of laws relating to marriage, Wharton Confl. Laws (1872), §§ 128-165. Mr. Wharton, in his very scholarly work, maintains that there are three distinct theories on this subject: (1) as generally maintained by English writers and the courts, that matrimonial capacity is determined by the law of the place of marriage; which he considers open to objection; (2) that it is determined by the law of the marrying parties' home; which he also considers open to objection; (3) that, as to marriages at home, capacity is determined by home law, and as to marriages abroad, "by the common law of Christendom;" and this last theory he prefers to the others. *Ib.*, §§ 160-165. As to conflict in the mode of celebrating marriage, see *ib.*, § 169-185.

39. People v. Steere, 151 N. W. 617; Sturgis v. Sturgis, 51 Ore. 10, 93 P. 696; State v. Fenn, 47 Wash. 561, 92 P. 417; Lanham v. Lanham, 136 Wis. 360, 117 N. W. 787, 17 L. R. A. (N. S.) 804.

40. Mitchell v. Mitchell, 117 N. Y. S. 671, 63 Misc. 580.

41. United States v. Rogers, 109 F. 886 (uncle and niece); Schofield v. Schofield, 51 Pa. Super. Ct. 564; Hyde v. Hyde, L. R. 1 P. & D. 130; Story Confl. Laws, § 114, 1 Burge Col. & For. Laws, 188.

upheld in another State where the parties live, which State forbids such marriages.[42]

So a marriage between cousins valid where made will be sustained in another State which declares such marriages incestuous, and in which the parties afterwards reside. The only exception to the general rule upholding marriages valid where made is where they are between kindred so close as to render the marriage repugnant to common decency and to the generally accepted opinion of Christendom, which relates only to persons in direct line of consanguinity and brothers and sisters, and does not embrace cousins.[43]

The reasoning of Lord Chancellor Campbell and other peers in the English case of *Brook* v. *Brook,* which went on appeal to the House of Lords, would seem to carry the exception to the rule of comity so far as to include not only immoral marriages, but marriages in violation of a law of domicile which absolutely forbids such unions everywhere.[44] The point actually sustained, however, in this case, was the invalidity of a marriage by affinity in a foreign country, where such marriages are lawful; but which have always been regarded as within the prohibition of God's law in England. The doctrine claimed, therefore, seems in reality that each nation shall define God's law for itself. The *lex loci contractûs,* we may remark in passing, does not seem of necessity to determine such legal consequences of a foreign marriage as the legitimation of antenuptial offspring.[45]

42. People v. Siems, 198 Ill. App. 342; Garica v. Garcia, 25 S. D. 645, 127 N. W. 586 (first cousins). See, however, Brook v. Brook, 9 H. L. Cas. 193.

43. Medway v. Needham, 16 Mass. 157, 8 Am. Dec. 131; State v. Ross, 76 N. C. 242, 22 Am. R. 678; Garcia v. Garcia (S. D.), 127 N. W. 586, 32 L. R. A. (N. S.) 424.

44. 3 Sm. & G. 481; s. c., 9 H. L. Cas. 193. See Sutton v. Warren, 10 Met. 451; Stevenson v. Gray, 17 B. Monr. 193.

45. Putnam v. Putnam, 8 Pick. 433. See, on this general subject, Lord Brougham in Warrender v. Warrender, 2 Cl. & F. 488; cases cited in note to 2 Kent Com. 93; references, *supra,* to treatises of Story, Burge, and Bishop. The marriage abroad of one attainted of treason is lawful. Kynnaird v. Leslie, L. R. 1 C. P. 389.

A court is bound to take notice of foreign laws, when those laws are clearly established. And in a certain instance the English courts, out of regard for the laws of the nativity and contemplated domicile of foreign subjects who had been married on English soil, disregarded the validity of the marriage under English laws so far as to entertain a petition for pronouncing nullity. Portuguese first cousins had thus married in London in accordance with the requirements of English law. Returning to Portugal, they did not cohabit as husband and wife, for by the law of Portugal marriages between first cousins are declared incestuous and null, unless the Pope grants a dispensation. Sir R. Phillimore held that the court of place of contract was not bound to treat the marriage as null.[46] But upon appeal this decision was reversed.[47]

There is much conflict as to the validity of marriages involving miscegenation. It has been held that a marriage between a white person and a negro will not be recognized in a State prohibiting such unions although valid where made,[48] although such a marriage is more favorably regarded when the parties were actually domiciled in the State where the marriage took place.[49]

So where a negro woman owns land in a State where marriages between whites and negroes are prohibited and declared void, and the woman moves into another State where such marriages are allowed and there marries a white man and dies there, her husband is entitled to inherit the land as her heir. The validity of the marriage is governed by the law of the State where it occurred and where the parties lived at the time.[50]

While a marriage valid where made is valid anywhere, the

46. Sottomayor v. De Barros, 2 P. D. 81.

47. Sottomayor v. De Barros, 3 P. D. 1. It is observable, however, that the marriage itself was not pronounced absolutely void apart from sentence of nullity.

48. State v. Kennedy, 76 N. C. 251; Kinney v. Commonwealth, 30 Gratt. (Va.) 858.

49. State v. Ross, 76 N. C. 242; *contra*, State v. Bell, 7 Baxt. (Tenn.) 9.

50. Whittington v. McCaskill (Fla.), 61 So. 236, 44 L. R. A. (N. S.) 630.

converse is also true, and a marriage contrary to public policy where made will not be upheld in another jurisdiction. So where an epileptic left the State of his domicile and married in a State expressly forbidding such a marriage, the marriage will not be affirmed in the State of the domicile, as the courts will there give it no higher value than it had where celebrated. The court refuses to hold that the prohibition against the marriage of epileptics is contrary to the public policy of the State which forbids the marriage of idiots, as it is recognized that epilepsy is a serious mental disease.[51] Thus is seen a further tendency to maintain that while forms and ceremonies of marriage are governed by the laws of the place of celebration, such essentials as public policy may deem fundamental, the State will uphold where such essentials are being violated to the detriment of its social morals, and most especially as against palpable evasions of such policy.[52]

Nor, we apprehend, would the marriages of such as are mentally and physically incapable. In *Conway* v. *Beazley,* the English courts refused to recognize a Scotch divorce and set aside a second marriage, but the facts showed a clear case of bigamy.[53]

§ 1263. Law of Domicile.

A marriage valid under the laws of a man's domicile will

51. Kitzman v. Kitzman (Wis.), 166 N. W. 789.

52. These fundamentals, it is said by the courts of such a State, depend upon and are governed by the laws of the country where the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Kinney v. Commonwealth, 30 Gratt. 858. Cf. State v. Ross, 76 N. C. 242, and State v. Kennedy, 76 N. C. 251, where such evasion, in a marriage between white and negro contrary to North Carolina laws, is made the plain point of distinction. The sensitiveness of a sovereignty to its own marriage policy must, in reality, dictate the line of decision in all such perplexing disputes, so long as no recognized umpire determines between States in such matters.

53. 3 Hag. Ec. 639; 5 Eng. Ec. 242. See also recent cases of Shaw v. Gould, L. R. 3 H. L. 55, sustaining Conway v. Beazley, *supra;* Wilson's Trusts, L. R. 1 Eq. 247.

usually be valid elsewhere,[54] but although the marriage was valid where made the law of the domicile may, for reasons of public policy, refuse to recognize it.[55] A marriage contracted in another State with intention to reside in the husband's State will be regarded as made in the latter State as far as the marital rights of the parties are concerned.[56]

§ 1264. Marriage by Mail.

A common-law marriage by letter between persons in different States is governed by the law of the State where the offer of marriage was received and accepted.[57]

§ 1265. Prohibition on Remarriage in Divorce Decree.[58]

A marriage valid where made will usually be upheld even in a State where one of the parties had been divorced and where a decree had been entered prohibiting his remarriage,[59] but it has been held that a statute forbidding remarriage after divorce is so drawn as to have extra-territorial effect and invalidates a marriage made in another State,[60] and the validity of such a marriage may depend on whether the parties were domiciled in the State where they remarried. Thus, if they go out of the State which imposed the prohibition and remarry, and immediately return, the marriage is void in the first State, while under this view if they acquire a domicile in the State where they marry the marriage will be recognized in the first State.[61]

54. Travers v. Reinhardt, 25 App. D. C. 567.

55. Hall v. Industrial Commission, 165 Wis. 364, 162 N. W. 312; Brook v. Brook, 9 H. L. Cas. 193. See *ante*, § 1262.

56. Glenn v. Glenn, 47 Ala. 204.

57. Great Northern Ry. Co. v. Johnson (U. S. C. C. A. N. D.), 254 F. 683.

58. This Topic will be found more fully treated *post*, § 1917 *et seq.*

59. Wood's Estate, 137 Cal. 129, 69 Pac. 900; Dudley v. Dudley, 151 Ia. 142, 130 N. W. 785; Griswold v. Griswold, 23 Colo. App. 365, 129 P. 560; *In re* Eichler, 146 N. Y. S. 846, 84 Misc. 667. See Commonwealth v. Lane, 113 Miss. 458.

60. Wilson v. Cook (Ill.) 100 N. E. 222; Lanham v. Lanham, 136 Wis. 360, 117 N. W. 787.

61. Knoll v. Knoll (Wash.), 176 P. 22.

§ 1266. Leaving State to Evade Its Laws.

Where persons go out of the State for the purpose of evading its marriage laws and return after the ceremony, the marriage so performed is void unless valid under the laws of the State of the domicile.[62]

A marriage made by a minor may be annulled by the court of the domicile of the parties although they left the State temporarily and were married in another State where such marriages were voidable merely and never cohabited as man and wife, but returned to the State of their domicile.

The opinion of the court is based on the right of a government to determine the status of its own citizens and prescribe the terms and conditions upon which their marital relations may be changed, and where such marriage is contrary to the public policy of the State it should be annulled. The court admit that a different decision might have been reached if there had been cohabitation and the possibility of bastardizing issue.[63]

So the validity of a marriage contracted by citizens of one State in another State, to which they have gone to evade the laws of their domicile, may be inquired into by the courts of the domicile.[64]

62. Norman v. Norman, 121 Cal. 620, 54 P. 143, 42 L. R. A. 343, 66 Am. St. R. 74 (marriage on high seas); Succession of Gabisso, 119 La. 704, 44 So. 438, 11 L. R. A. (N. S.) 1082; Levy v. Downing, 213 Mass. 334, 100 N. E. 638; Cunningham v. Cunningham, 206 N. Y. 341, 99 N. E. 845; reversing judgment, 130 N. Y. S. 1109, 145 App. Div. 919; Bays v. Bays, 174 N. Y. S. 212; *In re* Stull's Estate, 183 Pa. St. 625, 39 A. 16, 39 L. R. A. 539, 63 Am. St. R. 776, 41 Wkly. Note Cas. 481; Johnson v. Johnson, 57 Wash. 89, 106 P. 500.

Contra, State v. Hand, 87 Neb. 189, 126 N. W. 1002; Sturgis v. Sturgis, 51 Ore. 10, 93 P. 696; Leefeld v. Leefeld, 85 Ore. 287, 166 P. 953.

63. Cunningham v. Cunningham, 206 N. Y. 341, 99 N. E. 845, 43 L. R. A. (N. S.) 355. See *contra*, Levy v. Levy (Mass.), 100 N. E. 639.

64. Whippen v. Whipen, 171 Mass. 560, 51 N. E. 174.

CHAPTER XXI.

RESTRAINT OF MARRIAGE.

SECTION 1267. Wills; English Rule.
1268. Wills; American Rule.
1269. Bequest Conditioned on Separation.
1270. Restraint on Remarriage of Widows.
1271. Restraint on Marriage With Particular Person.
1272. Contracts.
1273. Deeds.

§ 1267. Wills; English Rule.

The policy of restraining marriage is treated with disfavor by our law, which, on the contrary, seems disposed to encourage the institution, though not to the extent practised by some countries of openly promoting its observance, or forcing private inclination in the conjugal direction. Numerous cases, those particularly which construe the provisions of testamentary trusts, have laid it down that the general restraint of marriage is to be discouraged. Accordingly a condition subsequent, annexed by way of forfeiture to a gift, legacy, or bequest, in case the donee or legatee should marry, will be held void and inoperative, as a restraint upon marriage; and so as to both income and capital.[65] But marriage and remarriage are differently viewed in this respect; and it is well settled that forfeiture by condition subsequent in case a widow shall marry again must be upheld as valid, whether that widow be the beneficiary through her husband or some other person. Does the latter rule apply equally to widow and widower, woman and man? Upon full consideration the English chancery held, on appeal (reversing the decision of the lower tribunal), that it does; and accordingly sustained a proviso under the will of a certain testatrix, by which property bequeathed in trust, with income payable to the surviving husband, went over upon his

65. See Bellairs v. Bellairs, L. R. 18 Eq. 510, and cases cited.

marrying again; this interesting point being raised for the first time.[66]

The English decisions, on the whole, do not strenuously resist these restrains upon marriage in testamentary trusts. It is held that a gift to one's widow on condition that she retire immediately into a convent is upon a good condition precedent.[67] Also, that it is a good condition subsequent which forfeits a gift to one's brother in case he marries "a domestic servant," or one of lower degree, degrading his own family.[68] And it is doubtful whether the rule discouraging restraint of marriage can extend to devises of land; though on principle there should be no distinction between devises and gifts or bequests in this respect.[69]

§ 1268. Wills; American Rule.

If an intention on the part of the testator to impose a general restraint upon the marriage of a devisee is established, then such restriction is void, and the devisee will take an absolute estate. The great weight of authority is to the effect that conditions annexed to a bequest or a devise, the tendency of which is unduly to restrict or restrain marriage, are contrary to public policy and void. So a devise to a daughter of a fee, "except she should marry, then at her death I desire that it shall revert to her legal

66. Allen v. Jackson, 1 Ch. D. 399, reversing s. c., L. R. 19 Eq. 631. See opinion of James, L. J., and authorities cited.

Rights are equal as to marrying again, so far as widow and widower are concerned, as all will readily admit. The lower court was probably influenced by considerations which medical men adduce, showing that marriage is more essential to a man's continuous well-being than a woman's, and that a widow, on the whole, is less likely to have sufficient reason for marrying again than a man. But this argument, if sound, is perhaps far-fetched, and James, L. J., on appeal, treated the subject more from the aspect of equal rights, as between the sexes, in the disposal of property. No act of parliament or decision of a court, he observed, established any distinction here between the second marriage of man or woman, and he knew of no reason for making it.

67. Duddy v. Gresham, 39 L. T. (N. S.) 48.

68. Jenner v. Turner, 29 W. R. 99.

69. Jones v. Jones, 1 Q. B. D. 279.

heirs," gives her a fee and the condition is void. This is a gift of a fee to be cut down to a life estate in case of marriage.[70]

So a provision in a will which gives certain property to an unmarried woman and provides that she shall take less if she marries is void as in restraint of marriage.[71]

In case of a gift of a life estate to daughters, but in case of their marriage then to be forfeited, the forfeiture is void as in restraint of marriage. But a provision for a life estate to daughters, providing that in case one should die without having been married the property should go to another, is not in restraint of marriage.[72]

Where at the time a will was made the sister of the testator was living apart from her husband, a bequest is valid of money to be paid to the sister when the executor shall be convinced that she could not live with her husband. This is not an unreasonable restriction, but is manifestly intended to fulfil the testator's duty to the sister if she should be unable to live with her husband. It is significant that she is not to be the judge as to whether she can live with her husband.[73]

§ 1269. Bequest Conditioned on Separation.

A legacy conditioned upon the death of the present wife of the legatee, the son of the testator, on his divorce from her or separation at the end of a year from such divorce or separation, or if within the year he shall be married to a respectable woman, then he is to receive the income from a certain fund, is not void as against public policy.

The court holds that the condition is not in restraint of marriage, for it rather encourages a new marriage. The court remarks that it has never been the public policy of the State to compel people to live together when married regardless of their inapti-

70. Meek v. Fox, 118 Va. 774, 88 S. E. 161, L. R. A. 1916D, 1194.

71. Knost v. Knost, 229 Mo. 170, 129 S. W. 665, 49 L. R. A. (N. S.) 627.

72. Sullivan v. Garesche, 229 Mo. 496, 129 S. W. 949, 49 L. R. A. (N. S.), 605.

73. Dusbiber v. Melville (Mich.), 146 N. W. 208, 51 L. R. A. (N. S.) 367.

tude for such cohabitation. To make the gift void it must appear that an illegal divorce or separation was intended, but where a legal proceeding is in the mind of the testator it is not against public policy.[74]

A bequest on condition that the legatee is legally divorced from her husband is not one tending to induce the separation of husband and wife, and the condition is not therefore void. A will speaks as of the date of the testator's death, and until that event it is ambulatory and subject to change. Such a condition is plainly a condition precedent, and is not an inducement to obtain a divorce in the future, as to have such an effect it must be a condition subsequent. No subsequent divorce could avail the legatee or satisfy the condition.[75]

Where the legatee and her husband are living apart a bequest to her so long as she is separated from her husband will be upheld as a provision made for her only while she is separated and not as an inducement to separation.[76]

§ 1270. Restraint on Remarriage of Widows.

There is only one main qualification to the rule against total restraint of marriage, and that is an exception touching widows. It seems settled law that men have a sort of mournful property right, so to speak, in the viduity of their wives, and that a grant or devise to them may be defeated by the violation of a condition subsequent providing for the grant or devise becoming inoperative or reverting in case of remarriage. It is a curiosity of the law that when a wife makes a grant with the same condition the general doctrine that conditions in restraint of marriage are void is applied with vigor.[77]

A devise to the widow in fee simple so long as she remains

74. Daboll v. Moon, 88 Conn. 387, 91 A. 646, L. R. A. 1915A, 311.

75. Nichols v. McDonald (Wash.), 172 P. 1146, L. R. A. 1918E, 986.

76. Sparks v. Southall, 54 L. T. 362.

77. Knost v. Knost, 229 Mo. 170, 129 S. W. 665, 49 L. R. A. (N. S.) 627.

unmarried gives her a defeasible fee rather than a life estate, and hence the husband's heirs have no interest to prevent her conveyance of the property before marriage.[78]

A provision in a will giving the widow a life estate in all the testator's property, but if she should remarry a division of the property should take place, giving the widow a certain share, is not void as in restraint of marriage where the division on remarriage seems to be on an equitable basis between the widow and son. There is not here any indication that there was any designs on his part to deter his wife from contracting another marriage or that he had any objection whatever to her so doing. He simply felt that it was fair and necessary that she should have the use of all the residue of his estate for her support and maintenance so long as she remained his widow, but that if she married again, thus presumably obtaining other means of support, the son ought properly to receive his fair share of the property at once.[79]

§ 1271. Restraint on Marriage With Particular Person.

Conditions in general restraint of marriage were at common law invalid, but conditions against marriage with particular classes of persons or specific persons are upheld. So a clause in a will that the daughter of the testator shall have only the income of a share of his property left to her if she marries F., or if F. is alive and she is unmarried, is valid. This is not an inducement to the murder of F. and is not void as against public policy.[80] And a bequest to a daughter conditioned on her not marrying a certain man named is valid although she is then engaged to marry him.[81]

§ 1272. Contracts.

It is settled law that a general restraint on marriage contained

78. Staack v. Detterding (Ia.), 161 N. W. 44, L. R. A. 1918C, 856.

79. *Re* Fitzgerald, 161 Cal. 319, 119 P. 96, 49 L. R. A. (N. S.) 615.

80. *Re* Seaman, 218 N. Y. 77, 112 N. E. 576, L. R. A. 1917A, 40.

81. Turner v. Evans (Md.), 106 A. 617.

in a contract is void.[82] Thus an agreement on condition that a woman would remain unmarried until the death of the promisor and remain in his employ is void as in restraint of marriage, and gives the woman no rights under it.[83]

An agreement of settlement of a claim for breach of promise of marriage by which the man agrees to pay the woman a sum of money if she remains single for three years is void as in restraint of marriage, and leaves the woman free to bring suit for the breach of promise. The immediate tendency of this promise was to discourage marriage, and as a rule that tendency stamps such contracts as illegal.[84] But where parties are engaged to be married, and the woman refuses to marry at that time on account of family objections, but agrees to remain true to him during his life, this engagement cannot be converted into an agreement in restraint of marriage.[85]

A contract for personal service is not rendered void and unenforcible simply because it contains a provision that the servant should remain unmarried. That particular clause is void and unenforcible, but where the restraint on marriage is a mere incident of the main object of the contract, and the servant does perform the services contracted for, the master's contract to give property in payment for the services rendered may be enforced.[86]

§ 1273. Deeds.

In a deed by parents to their daughter with a condition that in case of her marriage the property reverts to the grantors, the condition is void, and therefore, as there is no limitation over, she has a fee.[87]

82. For extended note on validity of contractual restraints on marriage, see 49 L. R. A. (N. S.) 639.

83. Lowe v. Doremus, 84 N. J. L. 658, 87 A. 459, 49 L. R. A. (N. S.) 632.

84. McCoy v. Flynn (Ia.), 151 N. W. 465, L. R. A. 1915D, 1064.

85. Quirk v. Bank, 244 Fed. 682.

86. Fletcher v. Osborn, 282 Ill. 143, 118 N. E. 446, L. R. A. 1918C, 331.

87. Gard v. Mason (N. C.), 86 S. E. 302, L. R. A. 1916B, 1077.

PART VIII.

VARIOUS MATTERS AFFECTING MARRIAGE.

CHAPTER I.

BREACH OF PROMISE OF MARRIAGE.

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§ 1274. Common-Law Action for Breach of Promise.

The action for breach of promise to marry applies the most prosaic of remedies to the most sentimental and romantic of complaints. The ashes are weighed on the cold altar after the sacred flame has gone out. Tender confidences, whispered protestations, the passionate phrase of love-letters, all those mysterious signs and symbols which love dotes upon, are carefully put together by twelve plain jurymen to establish a transaction, as though the wooing of a human heart were like bargaining for a pair of lungs. The consolation afforded to the afflicted suitor by the common law is that of pecuniary damages, on the principle that the other party has failed to fulfil the bargain.

Imprisonment for debt having been abolished in England and this country during the last century, a defendant cannot now be rightfully arrested for a cause of action which is based simply upon a breach of promise to marry, apart from any charge involving fraud or other legal turpitude.[88]

§ 1275. Foundation of the Right of Action.

A contract to marry must be clearly distinguished from the marriage contract, or marriage institution, which, as we have seen, rests upon solemn foundations of its own. Promises to marry have been treated by the common law from the earliest times on the general footing of agreements. Policy forbids, of course, that specific performance of such a contract be enforced in equity or treated at this day as a "precontract" or species of marriage.[89] But for breach of the promise an action would always lie for damages at the common law, as in other cases of assumpsit; though in aggravated cases we shall find damages assessed somewhat after the manner of a tort.

88. *In re* Tyson, 32 Mich. 262; Perry v. Orr, 35 N. J. L. 295.

Defendant is entitled to inpsect his love-letters in the plaintiff's possession, bearing upon the amount of damages. Pape v. Lister, L. R. 6 Q. B. 242.

89. Cheney v. Arnold, 15 N. Y. 345.

In the early reports, nevertheless, doubts were entertained as to the jurisdiction of common-law courts in such suits; and this, because the contract to marry was so nearly allied with marriage, while marriage from the time of Pope Alexander III, or the latter part of the twelfth century, was, in England, a matter for the cognizance of spiritual or ecclesiastical courts only. A motion to arrest judgment where the plaintiff had a verdict was argued on this ground in *Holcroft* v. *Dickenson*.[90] In 25 Car. II but three of the four judges (Chief Justice Vaughan dissenting) pronounced in favor of the plaintiff.

This historical uncertainty concerning the practice of bringing the common-law action in common-law courts was adverted to in an Indiana case,[91] where counsel for the defence made the very ingenious argument that at the first settlement of the United States there was no such common-law right of action at all. *Stretcher* v. *Parker*,[92] decided in 1639, was, as counsel contended, the earliest breach of promise case ever maintained in England in a common-law court. Admitting all this, however,[93] the question in Coke's day was one of jurisdiction local to England, and the doubt did not touch the right of action at all. "Indeed," observes Worden, J., "the principle which upholds such action is as old as the principle which gives damages in any case for the breach of a contract. And it is immaterial whether any case can be found in England prior to 1607, in which such action has been maintained." [94]

§ 1276. What Constitutes the Promise to Marry.

The general principles which underlie the whole law of contract must determine when and in what manner parties become bound to this most solemn of mutually dissoluble contracts. The prac-

90. Carter, 233.

91. Short v. Stotts, 58 Ind. 29.

92. 1 Rolle Abr. 22.

93. Authorities, including the Year Books, cited by Ellis, J., and others, in Holcroft v. Dickenson (Carter, 233), indicate that there were cases earlier than Stretcher v. Parker.

94. Short v. Stotts, 58 Ind. 29, 35.

tical difficulties are these: sexual fascination, not to add a common recognition of the very solemnity of such affairs, will draw a light-minded person very close to a promise who does not intend one; even with the serious the disposition is to leave more to inference than plain expression; and, moreover, mere favors and attentions on the one hand, or, on the other, deliberate arrangements between man and woman for dalliance and loose companionship, by no means amount to promises to marry.

If a man seriously and directly asks a woman to marry him, and she accepts with equal seriousness and directness, the case is a clear one of promise to marry; and the more so if these proposals have passed in writing. But doubts must arise where, as so often happens, circumstances less positive are relied upon to establish the engagement; and there might have been mere coquetry, flirtation, loose jest, or criminal purpose instead.

Some mutual contract to marry is requisite in order that one may sustain an action for breach of promise. But no particular form of words can be pronounced essential. It is sufficient if such language were used as to show that in fact the minds of the parties met.[95] And while the mutual intention should be serious and honorable, serious and honorable intention may be presumed in any case from acts and declarations justifying that inference; for where one so conducts as to induce the other to believe there is an engagement between them, and to act accordingly, and yet, after knowing that impression is produced, keeps on in the same tenor, such party, it is said, cannot set up a light or jesting purpose afterwards, or deny that the engagement in fact existed.[96]

But as to the evidence of a contract to marry, more direct proof is now commonly required than formerly, since modern statutes

95. Homan v. Earle, 53 N. Y. 267; Ellis v. Guggenheim, 20 Pa. St. 287.

96. Homan v. Earle, 53 N. Y. 267. And see Wightman v. Coates, 15 Mass. 5; Southard v. Rexford, 6 Cow. 254; Honeyman v. Campbell, 2 Dow & Cl. 282; 2 Chitty Contr. 790; Harvey v. Johnston, 6 C. B. 295.

permit parties themselves to take the stand, and tell their own story. While the old rule prevailed, excluding such interested witnesses, the contract was sometimes inferred from proof rather of such circumstances as usually attend an engagement. "This rule," observes Chief Justice Church, "permitted an implication, from what was proved, of a contract not proved."[97] Whatever the expression of earlier cases, then, a promise to marry cannot commonly be inferred alone at this day from one's devoted attention, frequent visits, and apparently exclusive attachment.[98] Nor from mere presents or letters, not to the point.[99] Nor from the plaintiff's sole announcements to friends, or her wedding preparations without the defendant's knowledge.[99a] Nor from what the man's mother or father may have said to the woman without his knowledge, and *vice versa*.[1] Nor from the woman's unexplained possession of an engagement ring.[2] Neither a mere courtship nor even an intention to marry can constitute, *per se*, a contract to marry.[3]

But the giving and accepting of an engagement ring, if properly shown, becomes a most important circumstance. And the understanding of a marriage intention having been once elicited from pertinent words, acts, or conduct of the parties to this transaction (for a formal interchange of promises is not necessary), we may find their courtship, their correspondence, the presents which passed between them, admissions by the defendant, and the like, all material in their bearing upon the main conclusion, and still

97. Homan v. Earle, 53 N. Y. 267, 271. Act 32 & 33 Vict., ch. 68, makes the parties to such suits admissible witnesses when their testimony is corroborated by other material evidence. Bessela v. Stern, L. R. 2 C. P. D. 265.

98. Homan v. Earle, 53 N. Y. 267; Walmsley v. Robinson, 63 Ill. 41; Burnham v. Cornwell, 16 B. Mon. 284.

99. See Commonwealth v. Walton, 2 Brews. 487.

99a. Cates v. McKinney, 48 Ind. 562; Walmsley v. Robinson, 63 Ill. 41; Russell v. Cowles, 15 Gray, 582; Graham v. Martin, 64 Ind. 567.

1. Lawrence v. Cooke, 56 Me. 187.

2. Commonwealth v. Walton, 2 Brews. 487.

3. Homan v. Earle, 53 N. Y. 267.

more material for fixing the amount of damages to be awarded in the suit.[4]

While mutual consent is understood to be at the foundation of the contract to marry, our law makes full allowance for the difference of sex. Logically speaking, either party might propose or accept; but it has been considered in the most enlightened ages the man's place to take the initiative and make the offer, the woman being the more passive of the two.[5] And, in general, where a promise is proved on the part of the man, evidence showing that the woman demeans herself afterwards as if concurring in the engagement will be liberally construed, though not by itself, perhaps, so conclusively establishing an acceptance as formerly, for the reasons we have already stated.[6]

Homan v. *Earle*[7] is an important illustration of our general principle, both because of Chief Justice Church's lucid exposition of the law and the delicate shading of the facts. Here a woman, evidently without reproach, had been led into a marriage engagement by a man whose conduct seems to have been purposely ambiguous. As the court observed, both parties to the suit were highly respectable, belonging to the same church; equals, except in pecuniary resources; the plaintiff about thirty, and the defendant fifty. The defendant, left a widower, began his visits soon after the death of his first wife, to the plaintiff, who had been her intimate friend. His visits grew longer and more frequent; there were rides and walks, caresses, and the usual endearing words. He gave the woman to understand that his wife had said something in her favor before she died. He spoke significantly of intending to marry when the year was out, of taking a

4. See Bessela v. Stern, L. R. 2 C. P. D. 265; Pape v. Lister, L. R. 6 Q. B. 242; Wetmore v. Mell, 1 Ohio St. 26; Moritz v. Mellhorn, 13 Pa. St. 331; Lahey v. Knott, 8 Ore. 198.

5. This principle is applied at common law to the tender which precedes the present action for damages, when the woman is plaintiff. *Post*, § 1289.

6. 3 Salk. 16, 64; Daniel v. Bowles, 3 C. & P. 553; Ellis v. Guggenheim, 20 Pa. St. 287.

7. Homan v. Earle, 53 N. Y. 267.

wife of a certain description which she answered, of expecting her to know some day all his business. She cautioned him, after he had gone on in this way for two months, that she considered this meant a great deal, and at the same time she offered him his freedom. This warning only made him press his suit the more ardently, though he was far from making himself explicit. But, coming to her after a few days' absence, he made, as she testified, a formal declaration of love, which she reciprocated. The two were then separated for six weeks, after which the visits went on, during a brief season, much as before. By this time, however, a curious proceeding on the man's part leaves us to infer that he had begun courting another woman, with whom he had lately become acquainted, and whom, in fact, he married about six months afterwards. Drafting a letter one day with his own hand to the effect that the plaintiff regarded his visits as evidence of friendship, and "nothing more," he persuaded her to copy and sign it. He wished this, he told her, because he did not want others to think they had any understanding together so soon after his wife's death. The defendant's conduct, when his new engagement came out, indicated that he was conscious of having wronged the plaintiff. The court refused to disturb a verdict rendered for the woman on these facts, notwithstanding "negative evidence," such as the absence of presents, a ring, letters, and definite plans of marriage.

It is the settled modern rule that it is not necessary that a contract to marry should have been expressed by any set form of words, but it is sufficient if the conduct and language of the parties were such as clearly to indicate a mutual engagement and understanding to marry.[8]

Both offer and acceptance must be proved,[9] and it is enough

8. Adams v. Byerly, 123 Ind. 368, 24 N. E. 130; Walters v. Stockberger, 20 Ind. App. 277, 50 N. E. 763; Edge v. Griffin (Tex. Civ. App.), 63 S. W. 148; Connolly v. Bollinger, 67 W. Va. 30, 67 S. E. 71 (indirect conversations and course of conduct indicating betrothal are enough).

9. Walters v. Stockberger, 20 Ind. App. 277, 50 N. E. 763 (when ac-

where it appears that the minds of the parties have met, although no express promise in language can be shown if it appears by the conduct of the parties that they both understood they were engaged.[10]

Where the seduction of the plaintiff is not alleged to enhance the damages, evidence of illicit intercourse is not admissible, where this intercourse has been kept secret,[11] but such evidence is admissible where a man has held out a woman as his wife, as this has a tendency at least to show that he had promised to marry her.[12]

§ 1277. Promises to Marry as Affected by the Statute of Frauds.

Treating promises to marry like all other contracts, we find old authorities assuming that where the contract is not to be performed within a year, it is void under the Statute of Frauds, unless expressed in writing. Thus, if A, in January, 1880, promises to marry B in February, 1881, B cannot feel sure that the engagement binds, unless the promise is put in black and white.[13]

A contract of marriage where no time is fixed is presumed not to be intended to be performed more than a year after its making, and therefore does not fall within the Statute of Frauds requiring a promise not to be performed within a year to be in writing.[14] If the promise is not to be performed within a year, then it must be in writing within the Statute of Frauds,[15] according to the

ceptance is known to other party); Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024; Erwin v. Jones (Mo. App.), 180 S. W. 428 (promise implied from acceptance of promise of the other party).

10. Hinckley v. Jewett, 86 Neb. 464, 125 N. W. 1086; Stamm v. Wood, 86 Ore. 174, 168 P. 69.

11. Lanigan v. Neely, 4 Cal. App. 766, 89 P. 441; Lauer v. Banning, 140 Ia. 319, 118 N. W. 446; Felger v. Etzell, 75 Ind. 417; Dupont v. McAdow, 6 Mont. 226, 9 P. 925.

12. Smith v. McPherson (Cal.), 167 P. 875, L. R. A. 1918B, 66.

13. 2 Parsons Contracts, 64; Browne Statute Frauds, § 215; Short v. Stotts, 58 Ind. 29; Derby v. Philps, 2 N. H. 515. But see Nichols v. Weaver, 7 Kan. 373.

14. Corduan v. McCloud (N. J.), 93 A. 724, L. R. A. 1915D, 1190.

15. Barge v. Haslam, 63 Neb. 296, 88 N. W. 516; 65 Neb. 659, 91 N. W. 528; 69 Neb. 644, 96 N. W. 245.

most recent authority. But some incline to construe the statute so as not to affect promises to marry, but promises in consideration of marriage, such as marriage settlements.[16] Where A promises to marry B within thirteen months, two years, &c., such a promise does not come under the statute at all, for it is capable of being performed within a year, and that is enough.[17] An agreement to marry may commonly be regarded as a continuing contract by mutual consent, and hence unaffected by the statute.

§ 1278. Conditional Agreement.

A contract to marry on the occurrence of an event is valid,[18] and a promise of marriage conditioned on the death of another is not void as an incitement to crime.[19]

§ 1279. Promise Conditioned on Pregnancy.

Under a statute making the seduction of an infant female a misdemeanor, no seduction takes place where the defendant suggests to the complaining witness sexual intercourse, and she says she is afraid something will happen, and she then obtains from him a promise to marry her if she becomes pregnant and then has intercourse with him.

The authorities are clear in this country that a promise of marriage conditioned on pregnancy, without other wiles or artifices, is a mere matter of barter. Such a promise has no tendency to overcome the natural sentiment of virtue and purity of a decent girl. The object of the statutes is to protect the chaste virgin against betrayal from an honest belief in the betrayer's protestations of love and affection, or a present unqualified promise of

16. Lawrence v. Cooke, 56 Me. 187; Paris v. Strong, 51 Ind. 339; Browne Statute Frauds, § 215; Clarke v. Pendleton, 20 Conn. 495.

17. See Blackburn v. Mann, 85 Ill. 222.

18. Lewis v. Tapman, 90 Md. 294, 45 A. 459, 47 L. R. A. 385; Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. R. 914 (on death of divorced wife). See Caylor v. Roe, 99 Ind. 1.

19. Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. R. 914.

marriage, or a present unqualified promise of marriage as an inducement for the commission of the act. They are not intended as a shield for a lascivious barter and sale of chastity either by a corrupt consideration or upon a promise of marriage contingent upon the possibility of pregnancy, which would at most be remote to the minds of the parties engaging in the immoral transaction.[20]

§ 1280. Whether Promise to Divorced Woman Is to Unmarried Female.

There is conflict of authority as to whether a divorced woman is within the terms of a statute punishing the seduction of an "unmarried female." The Virginia rule is that since a divorced woman has necessarily had experience in the lecherous ways of men she is immune from their wiles and does not need the protection of the law, and therefore that the phrase an "unmarried female" means a woman who has never been married.[21] What seems, however, to be the better view is that held in Oregon,[22] that the spirit of the law does not take into consideration the wisdom and experience of those whom it undertakes to protect from wrong, and that the law is intended for the protection of the chaste widow just as much as for that of the woman who has never been a wife.

§ 1281. Both Sexes May Sue.

In practice, it is found that the suit for breach of promise is almost exclusively a woman's weapon; not, we may imagine, because those light perfidies are wholly on the man's part, nor necessarily because, when injured, he feels his humiliation less, but rather on account of sexual differences of temperament and disposition, affecting the methods of resentment. If the promise to

20. Hamilton v. United States, 41 App. D. C. 359, 51 L. R. A. (N. S.) 809.

21. Jennings v. Comm., 109 Va. 821, 63 S. E. 1080, 21 L. R. A. (N. S.) 265; Cambridge v. Sutherland (1914), 20 D. L. R. 832, 7 West. Week. Rep. 1219. Validity of promise by divorced person, see *post*, § 1129.

22. Oregon v. Wallace (Ore.), 154 P. 430, L. R. A. 1916D, 457; People v. Weinstock, 140 N. Y. Supp. 455.

marry does not bind one of two adults, neither, on principle, ought it to bind the other; the consent is in fact reciprocal and obligatory;[23] and hence the right to sue for breach is against the party who breaks the promise, of whichever sex this may be. *Harrison* v. *Cage* is an English case of William III's time, where the discarded lover actually sued his false mistress, and won a verdict; and this strange reversal of the sexes in the face of justice did not deter the court from declaring unanimously that the plaintiff was entitled to judgment.[24]

§ 1282. Contracts by Infants, Lunatics, etc.

Insanity at the time of passing the promise is of course a good defence, but only because inconsistent with the idea of mutual assent; and former insanity could not be alleged in justification of the breach.[25]

The usual contract rules apply as to the competency of parties. A lunatic's promise to marry would not bind that party. Nor does a minor's, unless the minor ratifies the engagement on reaching majority. And here we may observe that the age at which a marriage binds a male or female is one thing, and the age of majority for the marriage promise another, the considerations of policy applying quite differently.[26] An English statute requires more than a ratification, to wit, a new and distinct contract, in order to bind an infant on his promise after he has come of age; and this statute covers promises to marry.[27]

23. 2 Chitty Contr. 789, Perkins' notes; Wightman v. Coates, 15 Mass. 5.

24. Harrison v. Cage, 12 Mod. 214 And see Baddeley v. Mortlock, Holt N. P. 151.

25. Baker v. Cartwright, 10 C. B. (N. S.) 124.

26. See Reish v. Thompson, 55 Ind. 34; Leichtweiss v. Treskow, 21 Hun, 487; Frost v. Vought, 37 Mich. 65.

27. Ditcham v. Worrall, L. R. 5 C. P. 410. Here, however, the court inferred a new promise from three years' recognition of the engagement formed by the defendant during his minority, and his asking the plaintiff to name the day. And see Northcote v. Doughty, 4 C. P. D. 385. It would appear that an infant may sue an

In this country a promise of marriage by an infant is not binding unless executed,[28] and one made by a lunatic,[29] or by one under guardianship as a spendthrift, is void.[30]

§ 1283. Consideration.

A mutual contract to marry is based on a valid consideration,[31] but a mere option to marry defendant on his request is not enforceable.[32]

No action can be maintained for breach of a promise of marriage made in consideration of illicit sexual intercourse between the parties,[33] a case which must be distinguished from that of seduction after promises have been interchanged. Nor can a mutual promise of incestuous or bigamous marriage be sued upon.[34]

adult for such breach. Chitty Contr. 790; 2 Str. 973; Willard v. Stone, 7 Cow. 22.

As to the breach of promise by one incurably impotent, see Gulick v. Gulick, 41 N. J. L. 13.

28. Feibel v. Obersky, 13 Abb. Prac. (N. Y.) 402; Wells v. Hardy, 21 Tex. Civ. App. 454, 51 S. W. 503 (although by statute a minor may contract for marriage).

29. O'Reilly v. Sweeney, 105 N. Y. S. 1033, 54 Misc. 408.

30. Sullivan v. Lloyd, 221 Mass. 108, 108 N. E. 923.

31. *As an infant's contract* is not void but only voidable, an action by an infant for breach of marriage promise cannot be defeated for want of mutuality. Davie v. Padgett, 176 S. W. 333; Pyle v. Piercy, 122 Cal. 383, 55 P. 141; Saxon v. Wood, 4 Ind. App. 242, 30 N. E. 797; Powell v. Moeller, 107 Mo. 471, 18 S. W. 884; Sponable v. Owens, 92 Mo. App. 174.

32. Smythe v. Greacen, 91 N. Y. S. 450, 100 App. Div. 275.

33. Davie v. Padgett (Ark.), 176 S. W. 333; Edmonds v. Hughes, 115 Ky. 561, 24 Ky. Law Rep. 2467, 74 S. W. 283; Gagush v. Hoeft (Mich.), 164 N. W. 400; Erwin v. Jones, 180 S. W. 428; Baldy v. Stratton, 11 Pa. St. 316; Spellings v. Parks, 104 Tenn. 351, 58 S. W. 126 (where engagement took place before the illicit intercourse, which was obtained on defendant's promise to marry plaintiff at once if she became pregnant, the contract is binding).

Where the intercourse is not the sole consideration for the marriage contract it is not void. Welge v. Jenkins (Tex. Civ. App.), 195 S. W. 272. See Crossett v. Brackett (N. H.), 105 A. 5 (contract valid although subsequent intercourse delayed marriage); Steinfield v. Levy, 16 Abb. N. Y. Pr. 26; Hanks v. Naglee, 54 Cal. 51.

34. Chitty, 793; 1 Ld. Raym. 386.

§ 1284. Construction.

A contract to marry generally without fixing the time implies an agreement to marry within a reasonable time,[35] but a definite statement of the time of marriage by an engaged person may be construed as a new and independent promise.[36] Where the parties agree to marry in accordance with the customs of a particular religion such customs become part of the marriage contract.[37]

§ 1285. Rescission or Modification.

A mutual release from a marriage engagement is the true way for parties to get rid of it; they who enter into such a promise mutually have mutually the power to rescind. But such a release must have been fairly and honorably procured in order to avail the party who sets it up.[38] The man or woman who breaks off an engagement discharges the other party; but the latter has the option of treating this as a breach, and making it the foundation of a suit for damages. Release of the promise, like the promise itself, may usually be by word of mouth.[39] An offer to release the other from his engagement acted on will operate to rescind the contract,[40] but mere forgiveness for breaking an engagement is not enough.[41]

35. Adams v. Byerly, 123 Ind. 368, 24 N. E. 130; Bowes v. Sly, 96 Kan. 388, 152 P. 17; Bennett v. Beam, 42 Mich. 346, 4 N. W. 8, 36 Am. R. 442 (promise to marry when promisor has completed certain work); Birum v. Johnson, 87 Minn. 362, 92 N. W. 1 (promise to be performed when promisor has completed certain work).

36. Parrish v. Parrish, 67 Kan. 323, 72 P. 844.

37. Waneck v. Kratky, 69 Neb. 770, 96 N. W. 651, 66 L. R. A. 798.

38. Homan v. Earle, 53 N. Y. 267; King v. Gillett, 7 M. & W. 55; Shellenbarger v. Blake, 67 Ind. 75. See Grant v. Willey, 101 Mass. 356.

39. See Dean v. Skiff, 128 Mass. 174.

40. Brown v. Gunderson, 123 Minn. 303, 143 N. W. 795; Torrey v. Hardy (Mo.), 196 S. W. 1100 (payment of money to discharge engagement); Dreibelbiss v. Banner (Mo. App.), 195 S. W. 68; Kellett v. Robie 99 Wis. 303, 74 N. W. 781.

41. Folz v. Wagner, 24 Ind. App. 694, 57 N. E. 564; Fisher v. Barber (Tex. Civ. App. 1910), 130 S. W. 871 (statement that it was all right); Mickens v. Phillips (Va. 1905), 51 S. E. 354 (hope that defendant will marry sometime).

Bad faith or misconduct by one of the parties which would not justify a divorce may justify the refusal of the other to enter into the marriage,[42] and one may rescind a marriage contract on discovering that the other party to it is a person of immoral character,[43] but a man cannot break an engagement simply because his betrothed allows him to have illicit intercourse with her, as he cannot take advantage of his own wrong.[44]

Postponement on account of the illness of the woman modifies the contract and imposes on the man the duty to wait a reasonable time before terminating the engagement.[45]

§ 1286. Performance and Breach.

A contract to marry, though evidenced by promises at different times, is but a single contract and a breach thereof is but one breach,[46] and the place of performance of a marriage contract is not merely the place of solemnization of the ceremony but the place where the parties are to be domiciled.[47]

If a person engaged to marry B marries C instead, such party puts it out of his or her power to fulfil the former engagement, and B may sue at once for breach of promise.[48] If, again, the wedding with B was set for a certain day, and A inexcusably fails to appear, B, who was ready, may treat the contract as broken. And modern precedents, moreover, both in England and the United States, favor the rule that a breach of contract arises upon a positive refusal to perform, although the time specified for performance has not yet arrived. Hence, where parties had engaged to marry "in the fall," fixing no day, and the man in October

42. Gross v. Hochstim, 130 N. Y. S. 315, 72 Misc. 343.

43. Williams v. Fahn, 119 Ia. 746, 94 N. W. 252.

44. Dunn v. Trout, 87 Ill. App. 432; Crossett v. Brackett (N. H.), 105 A. 5.

45. Travis v. Schnebly, 68 Wash 1, 122 P. 316.

46. Garmong v. Henderson, 112 Me. 383, 92 A. 322.

47. Campbell v. Crampton, 18 Blatchf. 150, 2 F. 417.

48. Bracken v. Dinnin, 141 Ky. 265,

announced his determination not to perform the contract, it was held that the woman might bring her action immediately.[49]

An engagement binds, even though no precise time be fixed for the marriage; for here the law presumes that a reasonable time shall elapse. And the reasonable time having elapsed, and one party inexcusably neglecting or refusing to fulfil the engagement, while the other requests marriage, and alleges readiness, the latter is amply justified in breaking off the match, and likewise, as it would appear, in suing the delinquent party.[50] The declaration ought in strictness to aver according to the promise; where the promise was conditional, or to marry within a certain period or at a certain date, the allegation and proof should be accordingly;[51] and if to marry within a reasonable time or on request, the declaration should correspond.[52] But courts are not always strict as to pleadings and proof in this respect.[53]

Failure to perform at the time fixed will amount to a breach,[54] but a mere postponement for reasonable cause does not.[55]

Where a man enters into a contract of marriage knowing that

132 S. W. 425; Sheahan v. Barry, 27 Mich. 217; Brown v. Odill, 104 Tenn. 250, 56 S. W. 840, 52 L. R. A. 660, 78 Am. St. R. 914; Caines v. Smith, 15 M. & W. 189.

49. Anderson v. Kirby, 125 Ga. 62, 54 S. E. 197, 114 Am. St. R. 185; Kurtz v. Frank, 76 Ind. 594, 40 Am. R. 275; Adams v. Byerly, 123 Ind. 368, 24 N. E. 130; Walters v. Stockberger, 20 Ind. App. 277, 50 N. E. 763; Cooper v. Bower, 78 Kan. 156, 96 P. 59; rehearing denied, 78 Kan. 164, 96 P. 794; Trammel v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. R. 302; Johnson v. Blomdahl, 90 Wash. 625, 156 P. 561; Burtis v. Thompson, 42 N. Y. 246. And see Holloway v. Griffith, 32 Ia. 409; Frost v. Knight, L. R. 7 Ex. 111; Gough v. Farr, 3 C. & P. 631.

50. Clements v. Moore, 11 Ala. 35; Chitty Contr. 791; Potter v. Deboos, 1 Stark. 82, per Lord Ellenborough; Greenup v. Stoker, 3 Gil. 202; Bennett v. Beam, 42 Mich. 346.

51. Chitty Contr. 791; Clark v. Pendleton, 20 Conn. 495; Peake, Add. C. 103.

52. Chitty Contr. 791; Caines v. Smith, 15 M. & W. 189.

53. See Bennett v. Beam, 42 Mich. 346; Hunter v. Hatfield, 68 Ind. 416.

54. Falk v. Burke, 93 Kan. 93, 143 P. 498 (waiver by subsequent negotiations); Wancek v. Kratky, 69 Neb. 770, 96 N. W. 651, 66 L. R. A. 798.

55. Walters v. Stockberger, 20 Ind. App. 277, 50 N. E. 763.

he has a venereal disease the woman has a right to treat his condition as a breach.[56]

§ 1287. Contracts by Married Persons Void.

If there is any one thing that a woman clearly understands it is that a man who is already married is not at liberty to take her to wife. The thought of making a marriage under such circumstances is a moral sin, while the passionate compact to do so when opportunity shall occur not only places the promising parties in a most perilous relation towards one another, but doubly exposes the conjugal party, whose rights obstruct their inclination, to wanton and wicked sacrifice. Hence a contract of marriage by two persons, one of whom is known by the other to be married to a third party, is void,[57] and when resting for its basic consideration on the securing of a divorce is against public policy and therefore wholly void.[58]

A contract to marry made while one of the parties is already married is void[59] though a suit for divorce is then pending,[60] or

56. Trammel v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. R. 302.

57. Carter v. Rinker, 174 F. 882 (where other party knows or has reason to know of the marriage); Smith v. McPherson (Cal.), 167 P. 875 (contingent on securing divorce); Miskell v. Murray, 204 Ill. App. 567; Davis v. Pryor, 3 Ind. T. 396, 58 S. W. 660, 50 C. C. A. 579, 112 F. 274; Morgan v. Muench (Ia.), 156 N. W. 819 (but second marriage after divorce is valid); Williams v. Igel, 116 N. Y. S. 778, 68 Misc. 354; Noice v. Brown, 38 N. J. L. 228; Paddock v. Robinson, 39 N. J. L. 133; s. c., 63 Ill. 99. See further *post*, § 1929.

The fact that plaintiff was under a legal disability to make a mutual promise before a divorce from her husband did not disqualify her from making an effective contract to marry six months after the date of her divorce. Leamon v. Thompson, 43 Wash. 579, 86 P. 926.

58. Paddock v. Robinson, 63 Ill. 99, 14 Am. R. 112; Noice v. Brown, 39 N. J. L. 133, 23 Am. R. 213; Smith v. McPherson (Cal.), 167 P. 875, L. R. A. 1918B, 66.

59. Paddock v. Robinson, 63 Ill. 99, 14 Am. R. 112 (promise to marry on death of present spouse).

60. Noice v. Brown, 38 N. J. L. 228, 20 Am. R. 288; 39 N. J. L. 133, 23 Am. R. 213.

where the husband and wife have been separated a long time [61] or have lost track of each other.[62] But an agreement to marry made while one of the parties has been divorced, but before the time has expired within which the decree has forbidden his remarriage, is valid when the new marriage is not to take place till the expiration of the period.[63] Therefore subsequent evidence that the successful plaintiff in a suit for breach of promise of marriage was a married woman when she brought her action is ample reason for reversal on appeal.[64]

But guilty complicity is what excludes the plaintiff, and hence one may doubtless sue for breach of promise if ignorant at the time of the engagement that the defendant was already married.[65] In Tennessee this reservation has been indulged to a grave latitude. A married man courted a young woman who supposed him single, offering himself by letter. She accepted in form, whereupon he confided to her at once in his next epistle that he had a wife then living, from whom he expected to procure a divorce on getting certain papers passed. Instead of repudiating the contract, inquiring into the affair for herself, or keeping in reserve, as a woman should, she encouraged his love, pressing him fervently to hurry up those papers. He could not procure the divorce, because he had no grounds for one; and then she sued him for his breach of promise. The plaintiff was an intelligent and well-educated person. And yet it was held that, not being *in pari delicto*, she could maintain her action upon the offer she had accepted while supposing him single, and that her subsequent

61. Williams v. Igel, 62 Misc. 354, 116 N. Y. Supp. 778.

62. Johnson v. Iss, 114 Tenn. 114, 108 Am. St. R. 981, 85 S. W. 79.

63. Buelna v. Ryan, 139 Cal. 630, 73 P. 466; Morgan v. Muench (Ia.), 156 N. W. 819. See *post*, § 1929.

64. Burton v. Dresden, London Law Journal, Nov. 11, 1916.

65. Davis v. Pryor, 3 Ind. T. 396, 58 S. W. 660, 50 C. C. A. 579, 112 F. 274; Waddell v. Walace, 32 Okla. 140, 121 P. 245; Kelley v. Riley, 106 Mass. 339; Wild v. Harris, 7 C. B. 999.

knowledge of his marriage could only be set up in diminution of damages.[66]

So according to the weight of authority an action for breach of promise will lie although the defendant was at the time married, if the plaintiff was ignorant of that fact when the promise was made, on the ground of estoppel,[67] and the same result is reached although the plaintiff learns of the defendant's marriage and still remains willing to carry out the contract on the defendant's securing his release.[68]

Although a promise to marry may be void when first made by one already married, still the promisor is liable when the promise is renewed after the divorce, after the former wife had married again and when there was no obstacle to prevent a remarriage,[69] and an agreement by a married person to marry another may be ratified on removal of the disability.[70] And where a party forbidden by a divorce decree to marry enters into an engagement to marry within the prohibited period the contract is not void where there was no engagement to marry within the period and the engagement lasted till the expiration of the period and was so ratified.[71]

§ 1288. Interference of a Third Party.

The courts have yielded principle to practical considerations in case a third party induces one to break a promise of marriage, even though the third party acts maliciously and wrongfully and uses threats and false representations. There seems no reason why the rule should be different in such cases from that in other

66. Coover v. Davenport, 1 Heisk. 368. *Semble* that in England one can promise to marry upon the event of a certain parent's death. Frost v. Knight, L. R. 7 Ex. 111.

67. Waddell v. Wallace, 32 Okla. 140, 141 P. 245, Ann. Cas. 1914A, 692.

68. Coover v. Davenport, 1 Heisk. (Tenn.), 368, 2 Am. R. 706.

69. Smith v. McPherson (Cal.), 167 P. 875, L. R. A. 1918B, 66.

70. Edelstein v. Brown, 100 Tex. 403, 100 S. W. 129, 95 S. W. 1126.

71. Buelna v. Ryan, 139 Cal. 630, 73 P. 466; Harpold v. Doyle, 16 Ida. 671, 102 P. 158.

cases of wrongful interference with a contractual relation, but the courts have been moved by the consideration that "The right of engaged parties to ask the advice of their friends and the right of the friends to give advice have never been denied. To hold that a third party may be subject to answer in damages for advising or inducing an engaged person to break the engagement might result in a suit by every disappointed lover against his successful rival. The State has an interest in the marriage relation, and until the marriage is solemnized no domestic rights exist and therefore cannot be violated." A loss of a marriage may be such a special injury as will support an action of slander or slander or libel, where the party was induced to break off the engagement by false and damaging charges not actionable *per se*, but otherwise there can be no action.[72] No action will even lie at suit of an engaged man for debauching his betrothed, seducing her and alienating her affections, and thus interfering with a marriage contract then subsisting between them.[73]

§ 1289. Offer and Refusal as Precedent to Action.

There must be in some form before action brought an offer by the plaintiff to marry and a refusal by the defendant,[74] but the plaintiff need make no offer or request after the defendant has refused to perform either expressly,[75] or where his conduct shows a refusal.[76]

72. Leonard v. Whetstone, 34 Ind. App. 383, 68 N. E. 197, 107 Am. St. R. 252; Homan v. Hall (Neb.), 165 N. W. 881, L. R. A. 1918C, 1195. See National Phonograph Co. v. Edison-Bell Consol. Phonograph Co., 96 L. T. N. S. (Eng.) 218, 31 Harvard Law Review, 900.

73. Davis v. Condit, 124 Minn. 365, 144 N. W. 1089, 50 L. R. A. (N. S.) 142.

74. Clark v. Corey, 24 R. I. 137, 52 A. 811.

75. Folz v. Wagner, 24 Ind. App. 694, 57 N. E. 564; Lemke v. Franzenburg, 159 Ia. 466, 141 N. W. 332; Rime v. Rater, 108 Ia. 61, 78 N. W. 835; Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024.

76. Birum v. Johnson, 87 Minn. 362, 92 N. W. 1; Hill v. Jones, 109 Minn. 370, 123 N. W. 927. See Bowes v. Sly, 96 Kan. 388, 152 P. 17.

On principle, some tender should precede all such common-law suits; and the plaintiff (due allowance being made for the natural modesty of the sex) ought to allege and prove an offer and refusal. Readiness, however, is held to be enough on a woman's part, since it is for the man *ducere uxorem*.[77] And where the defendant has incapacitated himself from fulfilment by marrying another, such allegation of request may be dispensed with.[78]

An offer of marriage after breach is ordinarily no defence,[79] though if made before action brought it may be shown in mitigation of damages,[80] and a conditional offer after breach is no defence,[81] but an offer after suit brought is no defence.[82]

A *bona fide* offer of marriage made by the defendant before plaintiff has signified her intention to end the matter will be a defence,[83] but where the male defendant delays for five years fulfilling his promise, and then in the evening offers to marry the plaintiff at once when he could not get a license that evening, and goes away and never does get a license, and where the plaintiff subsequently refuses to marry him, the questions are for the jury whether the defendant's offer was made in good faith and whether the plaintiff's rejection was made in good faith, and whether it put an end to the contract. The defendant's offer of marriage, if made after rejection, is no defence. The defendant's offer is not a defence unless made in good faith, and unless also the plaintiff has not signified an intention to regard the contract as at an end.[84]

77. Walters v. Stockberger, 20 Ind. App. 277, 50 N. E. 763; Crossett v. Brackett (N. H.), 105 A. 5; Cole v. Holliday, 4 Mo. App. 99; Graham v. Martin, 64 Ind. 567; Clements v. Moore, 11 Ala. 35.

78. Chitty Contr. 791.

79. Corduan v. McCloud, 87 N. J. Law, 143, 93 A. 724 Stacy v. Dolan, 88 Vt. 369, 92 A. 453; Kendall v. Dunn, 71 W. Va. 262; 76 S. E. 454.

80. Kendall v. Dunn (W. Va.), 76 S. E. 454, 43 L. R. A. (N. S.) 556.

81. Chapman v. Brown, 179 S. W. 774.

82. Connolly v. Bollinger, 67 W. Va. 30, 67 S. E. 71.

83. Falk v. Burke, 93 Kan. 93, 143 P. 498.

84. Corduan v. McCloud (N. J.), 93 A. 724, L. R. A. 1915D, 1190.

§ 1290. Defences in General.

The defendant's pre-engagement to another cannot avail against a suit for breach of promise, for this again would be alleging one's own wrong in exculpation;[85] and the plaintiff's pre-engagement, if offered by way of excuse, should be alleged as the plaintiff's fraud upon the defendant.[86] So where the defendant obtained a divorce to marry plaintiff he cannot attack the divorce as being fraudulent in defence of an action for a breach.[87]

A settlement invalid as in restraint of marriage will not be a defence,[88] and an agreement by which a woman agrees, in consideration of employment, not to make any claim against the defendant, is void as immoral, and no defence to an action for breach of promise of marriage.[89]

§ 1291. Incompatability as Defence.

Breach of a promise to marry cannot be justified on the ground that the defendant felt convinced that the proposed marriage would not promote the plaintiff's happiness; that the engagement proved their incompatibility of tastes and temperament; that they failed to respect or love one another, and the like.[90] Morally speaking, these are excellent reasons for breaking off a match; but the offended party has, nevertheless, at the law, the right to a money recompense, and for the courts to hold otherwise would well-nigh abolish the action.

Though decisions are not copious, we perceive that the principle of defence is the same, whether man or woman be the defendant, some allowance being made of course for differences of sex, as

85. Beachey v. Brown, E. B. & E. 796.

86. *Ib.*

87. Smith v. Hall, 69 Conn. 651, 38 A. 386; *contra*, Williams v. Igel, 116 N. Y. S. 778, 62 Misc. 354.

88. McCoy v. Flynn, 151 N. W. 465.

89. Lauer v. Banning, 152 Ia. 99, 131 N. W. 783.

90. Coolidge v. Neat, 129 Mass. 146; Houten v. Morse, 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. St. R. 373 (incompatibility and that plaintiff has negro blood).

between the weaker and stronger; that both parties are taken to be bound equally by a mutual promise to unite later in marriage; but that justifying cause of a breach may arise either out of matters antecedent to the engagement or matters pending its fulfilment, the discovery, for instance, of lewdness previous or subsequent to the interchange of promises. If one were prevented by act of God from performing the contract, the usual rule of contracts would seem to apply, though, as we shall see, no such action is permitted to survive against personal representatives.[91] Fault is taken especially into consideration in such suits; and even where a plea is inadequate as a defence, it may, nevertheless, be available to the defendant in mitigation of damages.

§ 1292. Illness or Incapacity.

That either of the parties (or both) is sick, infirm, incapable of breeding or procreation, or has led an immoral life, is not on principle a fatal obstacle to marriage, if the parties choose to take one another upon that understanding; nor is a *bona fide* contract for damaged goods less capable of enforcement *per se* than one for goods that are sound.

Plaintiff's illness may, however, be a defence,[92] especially where it makes marriage impossible,[93] unless the defendant knew of the disease at the time he made his promise,[94] and it is a good

91. *Post*, § 1296.

92. Grover v. Zook, 44 Wash. 489, 87 P. 638, 7 L. R. A. (N. S.) 582 (tuberculosis, though known to defendant at the time of engagement); Travis v. Schnebly, 68 Wash. 1, 122 P. 316. See Chitty Contr. 795; Hall v. Wright, E. B. & E. 746; Baker v. Cartwright, 10 C. B. (N. S.) 124.

93. *In re* Oldfield's Estate, 175 Ia. 118, 156 N. W. 977, L. R. A. 1916D, 1260; Gardner v. Arnett, 21 Ky. Law Rep. 1, 50 S. W. 840 (reappearance of venereal disease of which defendant believed himself cured); Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. R. 302 (discovery by defendant that he has a venereal disease entitles him to postpone marriage, although plaintiff is ready to marry him at once); Smith v. Compton, 67 N. J. Law, 548, 52 A. 386, 58 L. R. A. 480; Sanders v. Coleman, 97 Va. 690, 34 S. E. 621, 47 L. R. A. 581 (urinary disease which would be aggravated by marriage).

94. Beans v. Denny, 141 Ia. 52,

defence that plaintiff has voluntarily submitted to an unnecessary surgical operation whereby she became incapable of procreation.[95]

So in an action by a woman for breach of promise of marriage where it appeared that the original promise was made when the plaintiff was in sound health, and subsequently she became ill from kidney trouble and had two operations, and the defendant waited for her to recover for three years, at the end of which time she had not recovered, he is no longer bound to marry her. The court holds that the defendant agreed to marry a healthy woman and not an invalid, and that ill health is a defence to such an action as this. When the postponements were made to allow her time to recover this constituted a modification of the original contract and imposed upon the defendant the duty of waiting a reasonable length of time, and the jury should be instructed that if he waited a reasonable length of time and the plaintiff had not then recovered, he had a perfect right to withdraw from the engagement.[96]

A breach of contract to marry does not appear where the defence is that the defendant is afflicted with an infectious disease, and the ground of decision is that it would be contrary to public policy to hold that one should marry where there is danger of communicating disease to the other party or transmitting it to the offspring.[97] But where the only defence is that the defendant is so ill that marriage would be dangerous for him, and probably shorten his life, the better opinion is that this is no defence.[98] The fact that

117 N. W. 1091 (syphilis); Lemke v. Franzenburg, 159 Ia. 466, 141 N. W. 332.

95. Edmonds v. Hughes, 115 Ky. 561, 24 Ky. Law Rep. 2467, 74 S. W. 283.

96. Travis v. Schnebly, 68 Wash. 1, 122 P. 316, 40 L. R. A. (N. S.) 585.

97. Shackleford v. Hamilton, 93 Ky. 80, 19 S. W. 5, 15 L. R. A. 531; Allen v. Baker, 86 N. C. 91, 41 Am. R. 444; Grover v. Zook, 44 Wash. 489, 87 P. 638, 7 L. R. A. (N. S.) 582; Trammel v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854.

98. Hall v. Wright (El. Bl. & El. 746), (bleeding from the lungs); Smith v. Compton, 67 N. J. L. 548, 52 A. 386, 58 L. R. A. 480 (urinary disease); *Re* Oldfield (Ia), 156 N. W.

one cannot use what he has agreed to take is no defence in an action on an ordinary contract, and it seems there is no distinction in a contract to marry.

Hence, we apprehend, physical incapacity on the part of the man, or want of chastity on the part of the woman, may be, but is not necessarily, a defence; and, while the deceived woman might plead the one, or the deceived man the other, to justify breaking off the match, neither party can be permitted to set up his or her own physical incapacity or want of chastity to defeat the suit.[99] It is held that under a statute which pronounces the marriage of a person incurably impotent absolutely void, a breach of such a person's promise to marry constitutes no cause of action.[1] Why an impotent person's promise could not be relied upon as a ground of damages by the other, who was misled into the match without fault, we know not.[2]

§ 1293. Immorality as Defence.

A man, ignorant of a woman's immoral character at the time of the engagement, can break off the match upon finding it out, or if she prove unchaste subsequently.[3] This presupposes that he is not at fault; for if he has seduced her, or had carnal intercourse with her, or even condoned her fornication with others, he

977, L. R. A. 1916D, 1260 (anaemia). *Contra*, Sanders v. Coleman, 97 Va. 690, 34 S. E. 621, 47 L. R. A. 581 (urinary disease).

99. Hall v. Wright, E. B. & E. 746.

1. Gulick v. Gulick, 41 N. J. L. 13.

2. See Sprague v. Craig, 51 Ill. 288.

3. O'Neill v. Beland, 133 Ill. App. 594 (lewd correspondence); LaPorte v. Wallace, 89 Ill. App. 517; Bowman v. Bowman, 153 Ind. 498, 55 N. E. 422 (defendant must prove that plaintiff's previous unchastity was unknown to him, as a promise to marry an unchaste woman is binding); Edmonds v. Hughes, 115 Ky. 561, 24 Ky. Law Rep. 2467, 74 S. W. 283; Garmong v. Henderson, 115 Me. 422, 99 A. 177; s. c., 114 Me. 75, 95 A. 409; Colburn v. Marble, 196 Mass. 376, 82 N. E. 28 (unchastity before engagement); McKane v. Howard, 202 N. Y. 181 95 N. E. 642, reversing judgment, 123 N. Y. S. 632, 138 App. Div. 680 Foster v. Hanchett, 68 Vt. 319, 35 A. 316, 54 Am. St. R. 886; Von Storch v. Griffin, 77 Pa. St. 504; Sprague v. Craig, 51 Ill. 288.

cannot set up her misconduct in defence,[4] but mere immodest and indecent conduct of the woman before engagement is not a defence.[5]

Upon corresponding principles a woman can break off a match because she has ascertained that the man is of immoral character,[6] or because he treated her, during the engagement, in a brutal and violent manner.[7]

§ 1294. Fraud.

A promise to marry procured by fraudulent representation or concealment as to past life and circumstances would be a good defence;[8] our law in this respect applying the *caveat emptor* less rigidly, doubtless, than in the consummation of a marriage; and if the plaintiff at the time of the engagement knew that she was physically disqualified to contract marriage, and concealed such facts from the other party, this amounts to a fraud which prevents recovery.[9]

It is the rule in Massachusetts, however, that it is not the duty of a person before making an engagement to marry to communicate all the circumstances of his past life to the other party, and the parties will be bound if they enter into the contract without investigation or receiving assurances even though matters are subsequently discovered which would have prevented an engagement unless they are such as give the other party a right to terminate the contract upon their discovery.[10]

4. Houser v. Carmody, 173 Mich. 121, 139 N. W. 9; Snowman v. Wardwell, 32 Me. 275; Johnson v. Smith, 3 Pittsb. 184; Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024.

Illicit intercourse between the parties after engagement is no bar to an action for a breach. Fleetford v. Barnett, 11 Colo. App. 77, 52 P. 293.

5. Colburn v. Marble, 196 Mass. 376, 82 N. E. 28.

6. Baddeley v. Mortlock, Holt N. P. 151.

7. Leeds v. Cook, 4 Esp. 257.

8. Gross v. Hochstim, 130 N. Y. S. 315, 72 Misc. 343; Abbott, C. J., in 1 C. & P. 529.

9. Goddard v. Westcott, 82 Mich. 180, 46 N. W. 242.

10. Van Houten v. Morse, 162 Mass. 414, 38 N. E. 705, 26 L. R. A. 430, 44 Am. St. R. 373; Colburn v. Marble, 196 Mass. 376, 82 N. E. 28.

That one of the parties obtained money from the other by fraud is a defence,[11] and a woman's promise to marry made in pursuance of a scheme to obtain the confidence of another and his money is a false pretence when made with no intention of marrying, and she is liable under the "Confidence Game" statute.[12]

§ 1295. Time to Sue and Limitations.

The statute of limitations runs from the time of the breach,[13] and where no time for performance of a marriage contract is fixed it is presumed to be performed within a reasonable time, and suit may be brought after the lapse of a reasonable time,[14] but the statute does not begin to run until a refusal to marry.[15]

11. Gross v. Hochstim, 130 N. Y. S. 315, 72 Misc. 343.

12. People v. Miller, 278 Ill. 490, 116, N. E. 131, L. R. A. 1917E, 797.

13. Buelna v. Ryan, 139 Cal. 630, 73 P. 466; Huggins v. Carey (Tex. Civ. App.), 149 S. W. 390. See Bracken v. Dinning, 141 Ky. 265, 132 S. W. 425.

14. Corduan v. McCloud (N. J.), 93 A. 724, L. R. A. 1915D, 1190; s. c., 87 N. J. Law, 143, 93 A. 724.

15. Crossett v. Brackett (N. H.), 105 A. 5.

Where a promise of marriage is followed by cohabitation for nineteen years the right of action for refusal to marry is not barred by limitations, has been recently held in New Hampshire. The court remarks:

"After the promise has been made, it is the right of either party to demand performance, and if the demand be reasonable in point of time, etc., a refusal to comply therewith is a breach of the contract, and a cause of action arises. But until such a demand is made and insisted upon, the contract continues in force, unless abandoned by agreement of the parties, or disavowed by one of them.

"'Before a right of action accrues for the breach of a marriage contract, it must be averred and proved that the contract has been repudiated, and such repudiation must be shown by the acts, words, conduct or deed of the party who so repudiates it, and to be without sufficient reason or cause. There must be a refusal to marry or a repudiation in some way of the contract.' (Walters v. Stockberger, 20 Ind. App. 277, 50 N. E. 763.)

"The reasons which induce one of the parties to refrain from demanding present performance of the agreement are immaterial. If the question were whether the agreement to postpone for a fixed time were itself a binding contract, so that until the time had elapsed neither could demand performance, the question of the legality of the consideration for it would be presented. But no such question arises upon the evidence in

Where the defendant declares he will not carry out his promise to marry, suit can be brought upon it at once, although the time within which it was to have been performed has not expired.[16] Statutory provisions that no acknowledgment or promise is sufficient evidence of a new or continuing contract to take the case out of the operation of the Statute of Limitations unless in writing have no reference to repeated promises of marriage.[17]

§ 1296. Abatement on Death.

It is now settled in England that an action for breach of promise of marriage will not survive the death of the defendant even though special damage is alleged, as in a recent English case,[18] notwithstanding *dicta* in earlier cases that an action might survivo

this case. The plaintiff does not rely upon such promise to make out her cause of action. The evidence of their relations and negotiations is material to the plaintiff's case merely to show that the original promise to marry had not been abandoned.

"The original promise and the ultimate refusal to perform being shown, it was incumbent upon the defendant to excuse or justify the refusal. The mere fact that there had been no disavowal or abandonment at an earlier date was sufficient for the plaintiff's purposes, and proving that failure to disavow was induced by illegal acts in which both partipated would not show that there was a disavowal.

"Since the cause of action arose at the time of breach and not when the original promise was made, the action was seasonably brought. The plaintiff's evidence was that there was no breach until shortly before suit was begun. It is of no consequence that she might have made and insisted upon a demand for performance at a much earlier date. It it not the right to demand performance, nor even the demand which creates the right to sue, but the refusal to comply with the demand, or the disavowal of the contract when no demand is made. If the defendant had desired to terminate the contract at an earlier date, he could have done so at any time. As he did not do so, he cannot claim the protection of the Statute of Limitations. He is sued for breaking the contract, not for making it. The nonsuit was properly denied." Crossett v. Brackett (N. H.), 105 A. 5.

16. Zatlin v. Davenport, 71 Ill. App. 292; Lewis v. Tapman, 90 Md. 294, 45 A. 459, 47 L. R. A. 385; Connolly v. Bollinger, 67 W. Va. 30, 67 S. E. 71.

17. Smith v. McPherson (Cal.), 167 P. 875, L. R. A. 1918B, 66.

18. Quirk v. Thomas, L. R. 1915, 1 K. B. 798.

in case of special damage. The action was held to abate even though it was alleged the plaintiff had given up a profitable millinery business in consequence of the defendant's promise. This decision illustrates the modern tendency of the courts to discourage actions for breach of promise as much as possible.

In this country an action for breach of promise to marry will not lie against the personal representative of a deceased promisor, where no special damages are alleged and proved;[19] a rule which might seem to regard the tortious rather than contract aspect of such suits, whereby the breach becomes a personal injury, but which, perhaps, aims rather to make death good cause for non-fulfilment, regardless of damage to the other party. There is authority in this country, however, that the defendant's death does not abate the action.[20]

§ 1297. Damages.

As to the damages allowable in actions for breach of promise, the general principle is that of compensating the aggrieved party for the loss sustained in consequence of the non-fulfilment of a contract. And yet, from the nature of the case, such damages are not easily liquidated, and a jury must exercise great latitude of discretion, according to the circumstances, just as in actions founded on a tort. The plaintiff's avoidance of a marriage without affection might in reality be esteemed a gain rather than a loss. But the law does not so reason; it allows the prospective money value or worldly advantage of the marriage which is lost to be taken into the estimate of damages; and, moreover, the injury to the plaintiff's affections, the mortification, and the distress of mind consequent upon breaking off the match.[21]

19. Smith v. Sherman, 4 Cush. 408, Grubb v. Sult, 32 Gratt. 203; Wade v. Kalbfleisch, 58 N. Y. 282.

20. Shuler v. Millsaps, 71 N. C. 297, rules, for one State at least, that the action for breach of promise does not abate on account of the defendant's death. See Parsons v. Trowbridge, 226 Fed. 15, 140 C. C. A. 310; O'Brien v. Manning, 166 N. Y. S. 760, 101 Misc. 123.

21. Berry v. Da Costa, L. R. 1 C. P.

Though the action is one in contract the damages are not determined in principle, as in actions of contract, but rather as in tort,[22] and the jury in fixing the damages should consider all the facts and circumstances,[23] and all damages proximately resulting from the breach,[24] including satisfaction for the services rendered in reliance on such promise,[25] and that the plaintiff had lived with the defendant in reliance on a marriage ceremony which was void.[26]

The loss of time and the reasonable expenses incurred in preparation for marriage are grounds of damage not special, but directly incidental to the breach of promise, and hence the length of the engagement and the progress made towards a fixed wedding-day may have a material bearing upon the amount to be awarded.[27]

The jury may take into consideration the plaintiff's loss of opportunity during her engagement for contracting a suitable marriage with another,[28] but not the fact the plaintiff had broken an

331; Chitty Contr. 795, and cases cited in note of Perkins; Sedgwick Damages, 2d ed., 368; Coolidge v. Neat, 129 Mass. 146; Harrison v. Swift, 13 Allen, 144; Lawrence v. Cooke, 56 Me. 187; Sheahan v. Barry, 27 Mich. 217.

22. Baumle v. Verde (Okla.), 124 P. 1083, 41 L. R. A. (N. S.) 840; Stacy v. Dolan, 88 Vt. 369, 92 A. 453.

23. Poehlmann v. Kertz, 204 Ill. 418, 68 N. E. 467, 105 Ill. App. 249; Olmstead v. Hoy, 112 Ia. 349, 83 N. W. 1056 (length of time of engagement); White v. Weston (Mass.), 122 N. E. 714; Baumle v. Verde, 150 P. 876 (in discretion of jury).

24. Birkel v. Powers, 208 Ill. App. 430; Churan v. Sobesta, 131 Ill. App. 330; Bowes v. Sly, 96 Kan. 388, 152 P. 17 (breach not proximate cause of seduction or miscarriage); Duff v. Judson, 160 Mich. 386, 125 N. W. 371, 17 Det. Leg. N. 86 (loss of arm where breach forced plaintiff to work with ulcer on arm); Fisher v. Oliver, 172 Mo. App. 18, 154 S. W. 453; Waddell v. Wallace, 32 Okla. 140, 121 P. 245; Kendall v. Dunn, 71 W. Va. 262, 76 S. E. 454.

25. Smith v. Hall, 69 Conn. 651, 38 A. 386.

26. Massucco v. Tomassi, 78 Vt. 188, 62 A. 57.

27. Smith v. Sherman, 4 Cush. 408; Grant v. Willey, 101 Mass. 356; Coolidge v. Neat, 129 Mass. 146. That a wedding-day was announced and invitations sent out tends, too, to enhance damages, as making the mortification and distress greater. See Reed v. Clark, 47 Cal. 194.

28. Hively v. Golnick, 123 Minn. 498, 144 N. W. 213, 49 L. R. A. (N. S.) 757.

engagement with another at the defendant's solicitation.[29] Damages may include the injury to the plaintiff's health, which need not be specially pleaded as an element of damage,[30] and mortification of feelings of the plaintiff,[31] and that the engagement is known to others is admissible as showing the humiliation.[32]

The jury may consider also the financial circumstances of the defendant, his social position and all the rights and privileges which would flow to the plaintiff from the marriage, the injuries to the plaintiff's feelings and distress of mind, injury to her future prospects of marriage and injury to her reputation, moral and, if the case showed any physical injury, physical.[33] So in general the plaintiff may show the money value or worldly advantage of the marriage to her,[34] of a home and support if married,[35] including the defendant's earnings[36] and specific property owned by the defendant, and his financial standing,[37] and even his reputation for

29. Hahn v. Bettingen, 81 Minn. 91, 83 N. W. 467, 50 L. R. A. 669.

30. Hively v. Golnick, 123 Minn. 498, 144 N. W. 213, 49 L. R. A. (N. S.) 757.

31. Thrush v. Fullhart, 230 F. 24, 144 C. C. A. 322; Davie v. Padgett, 176 S. W. 333; Parker v. Forehand, 99 Ga. 743, 28 S. E. 400; Graves v. Rivers, 123 Ga. 224, 51 S. E. 318; Grubbs v. Pence, 25 Ky. Law Rep. 170, 74 S. W. 709; s. c., 24 Ky. Law Rep. 2183, 73 S. W. 785; Coolidge v. Neat, 129 Mass. 146; Hickey v. Kimball, 109 Me. 433, 84 A. 943; Densmore v. Thurston, 114 Me. 554, 96 A. 1068; Liese v. Meyer, 143 Mo. 547, 45 S. W. 282; Huggins v. Carey (Tex. Civ. App.), 149 S. W. 390; Arbon v. Blyth (Utah), 179 P. 979.

32. Liebrandt v. Sorg, 133 Cal. 571, 65 P. 1098.

33. Kendall v. Dun (W. Va.), 76 S. E. 454, 43 L. R. A. (N. S.) 556; Bennett v. Beam, 42 Mich. 346; Hunter v. Hatfield, 68 Ind. 416; Lawrence v. Cooke, 56 Me. 187.

34. Jacoby v. Stark, 205 Ill. 34, 68 N. E. 557; McKenzie v. Gray, 143 Ia. 112, 120 N. W. 71; Geiger v. Payne, 102 Ia. 581, 69 N. W. 554, 71 N. W. 571.

35. Thrush v. Fullheart, 230 F. 24, 144 C. C. A. 322; Lauer v. Banning, 152 Ia. 99, 131 N. W. 783; Coolidge v. Neat, 129 Mass. 146; Densmore v. Thurston, 114 Me. 554, 96 A. 1068; Liese v. Meyer, 143 Mo. 547, 45 S. W. 282.

36. Rime v. Rater, 108 Ia. 61, 78 N. W. 835.

37. McKee v. Mouser, 131 Ia. 203, 108 N. W. 228; Vierling v. Binder, 113 Ia. 337, 85 N. W. 621 (at time of trial); Morgan v. Muench (Ia.), 156 N. W. 819; Houser v. Carmody,

wealth [38] and social position,[39] and the social and domestic benefits which the plaintiff might reasonably expect from the marriage.[40] Evidence is not, however, admissible of the amount of property owned by the plaintiff's father.[41]

Where the party who broke the contract dies before action the plaintiff is not as matter of law entitled to recover one-third of the estate.[42]

§ 1298. Seduction, etc., in Aggravation of Damages.

In suits where the woman is plaintiff, damages are heavily aggravated in case she appears to have been seduced upon faith of the engagement; and here the defendant becomes assessed in fact chiefly by way of exemplary damages for debauching his betrothed.[43] According to the great weight of authority a woman who has been seduced by means of a promise of marriage can recover, in a suit

173 Mich. 121, 139 N. W. 9; Birum v. Johnson, 87 Minn. 362, 92 N. W. 1; Tamke v. Vangsness, 72 Minn. 236, 75 N. W. 217; Casey v. Gill, 154 Mo. 181, 55 S. W. 219; Fisher v. Oliver, 172 Mo. App. 18, 154 S. W. 453; Smith v. Compton, 67 N. J. Law, 548, 52 A. 386, 58 L. R. A. 480; Fisher v. Barber (Tex. Civ. App. 1910), 130 S. W. 871; Fisher v. Kenyon, 56 Wash. 8, 104 P. 1127.

38. Humphrey v. Brown (U. S. C. C. Cal. 1898), 89 F. 640; McKee v. Mouser, 131 Ia. 203, 108 N. W. 228; Rime v. Rater, 108 Ia. 61, 78 N. W. 835; Birum v. Johnson, 87 Minn. 362, 92 N. W. 1; *contra*, Johansen v. Modahl, 4 Neb. 411, 94 N. W. 532.

39. Tamke v. Vangsness, 72 Minn. 236, 75 N. W. 217.

40. Funderburgh v. Skinner (Tex. Civ. App.), 209 S. W. 452.

41. In an action for breach of marriage promise, evidence as to the amount of property owned by defendant's father is inadmissible. Spencer v. Simmons, 160 Mich. 292, 125 N. W. 9, 17 Det. Leg. N. 14.

42. Parsons v. Trowbridge, 226 F. 15, 140 C. C. A. 310. See O'Brien v. Manning, 166 N. Y. S. 760, 101 Misc. 123 (inchoate right of dower considered, but not possible loss of gift by will).

43. Berry v. Da Costa, L. R. 1 C. P 331; Bennett v. Beam, 42 Mich. 346; Kelley v. Riley, 106 Mass. 339; Williams v. Hallingsworth, 6 Baxter, 12; Sauer v. Schulenberg, 33 Md. 288; Hattin v. Chapman, 46 Conn. 607; Sheahan v. Barry, 27 Mich. 217.

Seduction of plaintiff by defendant by means of the alleged promise must be alleged in the complaint; otherwise proof thereof will not be admitted to enhance the damages. Leavitt v. Cutler, 37 Wis. 46; Cates v. McKinney, 48 Ind. 562.

for breach of the promise, damages for the seduction by way of aggravation. This is on the theory that she cannot recover the full damage caused by the breach of the promise unless permitted to show all the circumstances contributing to the distress of mind, which is an acknowledged element of her damage,[44] but even in States following this rule the evidence is limited to the seduction, and further evidence cannot be given of additional damages from the fact that the plaintiff became pregnant or suffered a miscarriage, or became sick therefrom.[45]

On the other hand, it is argued that at common law a woman cannot recover damages for her seduction because she is a consenting party to the wrongful act, and to permit her to show the seduction in aggravation of the damages sustained from the breach of the promise is to permit her to recover indirectly what the law has emphatically and consistently forbidden her to recover.[46]

Among those courts which hold that seduction may be shown in

44. Anderson v. Kirby, 125 Ga. 62, 54 S. E. 197, 114 Am. St. R. 185; Churan v. Sebesta, 131 Ill. App. 330; Davis v. Pryor, 3 Ind. T. 396, 58 S. W. 660 (although seduction took place in another State); Lauer v. Banning, 152 Ia. 99, 131 N. W. 783; Dalrymple v. Green, 88 Kan. 673, 129 P. 1145; Sramek v. Sklenar, 73 Kan. 450, 85 P. 566; Johnson v. Levy, 122 La. 118, 47 So. 422; Houser v. Carmody, 173 Mich. 121, 139 N. W. 9; Jaskolski v. Morawski, 178 Mich. 325, 144 N. W. 865; Liese v. Meyer, 143 Mo. 547, 45 S. W. 282; Clemons v. Seba, 131 Mo. App. 378, 111 S. W. 522; Mainz v. Lederer, 21 R. I. 370, 43 A. 876; Huggins v. Carey, 108 Tex. 358, 194 S. W. 133, 149 S. W. 390; Funderburgh v. Skinner (Tex. Civ. App.), 209 S. W. 452; Freeman v. Bennett (Tex. Civ. App.), 195 S. W. 238 (although plaintiff had been seduced previously); Welge v. Jenkins (Tex. Civ. App.), 195 S. W. 272 (mortification on becoming mother of illegitimate child); Huggins v. Carey (Tex. Civ. App), 149 S. W. 390; Stokes v. Mason, 85 Vt. 164, 81 A. 102; Salchert v. Reinig, 135 Wis. 194, 115 N. W. 132; Luther v. Shaw, 157 Wis. 231, 147 N. W. 17; Collins v. Mach, 31 Ark. 684; Judy v. Sterrett, 153 Ill. 94, 38 N. E. 633; Kniffen v. McConnell, 30 N. Y. 285; Stokes v. Mason (Vt.), 81 A. 162, 36 L. R. A. (N. S.) 388.

45. Dalrymple v. Green, 88 Kan. 673, 129 Pac. 1145, 43 L. R. A. (N. S.) 972; Giese v. Schultz, 65 Wis. 487, 27 N. W. 353. See *contra*, Booren v. McWilliams, 26 N. D. 558, 145 N. W. 410 (suffering at birth of child may be shown).

46. Sheahan v. Barry, 27 Mich. 217; Wrynn v. Downey, 27 R. I. 454, 63

actions for breach of promise in aggravation of damages there is some conflict of authority as to whether the seduction must be specially pleaded. The better rule seems to be that seduction should be specially pleaded as being special damages not the natural and usual result of the acts complained of, and as giving the defendant full notice of what he has to meet.[47]

That the plaintiff contracted a venereal disease from the defendant may not be shown in aggravation,[48] and it is not an aggravation of damages that the defendant induced the plaintiff to marry another.[49]

A woman's good name is so sacredly guarded by our law that where the male defendant to an action for breach of promise makes wanton, malicious, or reckless allegation in defence that the plaintiff is unchaste, having no reason to believe such allegation true, his failure to exhibit the fact in proof may be taken in aggravation of the damages.[50]

A. 401, 4 L. R. A. 615, 114 Am. St. R. 63; Anderson v. Kirby, 125 Ga. 62, 54 S. E. 197.

Rape or mere sexual intercourse cannot be considered in aggravation of damages in an action for breach of promise to marry. Fletcher v. Ketcham, 160 Ia. 364, 141 N. W. 916.

47. Hendry v. Ellis (Fla.), 54 So. 797, 33 L. R. A. (N. S.) 702; Geiger v. Payne, 102 Ia. 581, 69 N. W. 54, 71 N. W. 571; Tyler v. Salley, 82 Me. 128, 19 A. 107; Leavitt v. Cutler, 37 Wis. 46; *contra*, Coil v. Wallace, 24 N. J. L. 291; Dent v. Pickens, 34 W. Va. 240, 12 S. E. 698.

48. Churan v. Sebesta, 131 Ill. App. 330.

49. Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. R. 302.

50. Fleetford v. Barnett, 11 Colo. App. 77, 52 P. 293; Liese v. Meyer, 143 Mo. 547, 45 S. W. 282; Pearce v. Stace, 207 N. Y. 506, 101 N. E. 434, reversing judgment, 129 N. Y. S. 1139, 145 App. Div. 900 (when attack made in bad faith); Duvall v. Fuhrman, 2 O. C. D. 174, 3 Ohio Cir. Ct. R. 305 (unless attempt made with reasonable hope of success); Osmun v. Winters, 30 Ore. 177, 46 P. 780; Kaufman v. Fye, 99 Tenn. 145, 42 S. W. 25 (although defence was not made in bad faith); Simpson v. Black, 27 Wis. 206; Leavitt v. Cutler, 37 Wis. 46; Powers v. Wheatley, 45 Cal. 113; Reed v. Clark, 47 Cal. 194. This is as far as the reason of the principle extends; but the language of some New York decisions would seem to make the rule more sweeping. See 6 Cow. 654, cited in Thorn v. Knapp, 42 N. Y. 474; Tompkins v. Wadley, 3 Thomp. & C. 424.

§ 1299. Punitive Damages.

In some States exemplary damages may be awarded when the defendant has been guilty of fraud or evil motives [51] or seduction.[52]

Punitive damages in an action for breach of promise of marriage are awarded upon like grounds as in actions of tort in some States, and the authorities have since a very early date generally treated the action as one carrying with it as to damages the elements of a tort. In a State where by statute punitive damages are limited to cases where the defendant has been guilty of malice, fraud or oppression, it is error to allow the jury to give punitive damages where a mere failure to carry out the agreement appears.[53] But the jury may not award punitive damages on account of the defendant's setting up the defence that the plaintiff was epileptic unless this defence was set up maliciously.[54]

§ 1300. Mitigation of Damages.

The conditions of the parties known to both are properly considered in mitigation of damages.[55] In mitigation of damages for breach of promise to marry may be shown the plaintiff's dissolute habits and character, drunkenness, incontinence, and the like, such as to unfit that party for companionship in married life,[56] and

51. Jacoby v. Stark, 205 Ill. 34, 68 N. E. 557; Goddard v. Westcott, 82 Mich. 180, 46 N. W. 242; Hively v. Gollnick, 123 Minn. 498, 144 N. W. 213, 498, 49 L. R. A. (N. S.) 757; Tamke v. Vangsness, 72 Minn. 236, 75 N. W. 217; Duvall v. Fuhrman, 3 Ohio Cir. Ct. R. 305, 2 O. C. D. 174; Baumle v. Verde, 33 Okla. 243, 124 P. 1083, 41 L. R. A. (N. S.) 840; Luther v. Shaw, 157 Wis. 231, 147 N. W. 17; *contra*, Trammell v. Vaughan, 158 Mo. 214, 59 S. W. 79, 51 L. R. A. 854, 81 Am. St. R. 302 (malice is only aggravation increasing compensatory damages).

52. Lanigan v. Neely, 4 Cal. App. 760, 89 P. 441; Morgan v. Muench (Ia.), 156 N. W. 819.

53. Baumle v. Verde (Okla.), 124 P. 1083, 41 L. R. A. (N. S.) 840.

54. Hively v. Golnick, 123 Minn. 498, 144 N. W. 213, 49 L. R. A. (N. S.) 757.

55. Walker v. Johnson, 6 Ind. App. 600, 33 N. E. 267, 34 N. E. 100.

56. Van Storch v. Griffin, 71 Pa. St. 240; Button v. McCauley, 1 Abb. N. Y. App. 282; Hunter v. Hatfield, 68 Ind. 416; Williams v. Hollingsworth, 6 Baxter, 12.

undesirable traits of the plaintiff which are not a defence to her action may still be shown in mitigation of damages.[57]

Evidence of specific immodest acts by the plaintiff before her engagement are not admissible in mitigation of damages,[58] but evidence of illicit intercourse by the plaintiff with other men is admissible,[59] but not illicit intercourse between the parties,[60] or mutual improprieties and lewdness together.[61]

Whatever shows, too, that the plaintiff viewed the proposed marriage in a spirit not befitting the relation, and inconsistent with a purpose to fulfil its objects faithfully — as, for instance, admissions that the defendant's proposals were accepted to spite others, or only for the sake of his money — is competent for the same purpose.[62] And as to such admissions on the plaintiff's part, the material question is, not when they were made, but what they tended to prove,[63] and whether they indicated the true state of the plaintiff's feelings while the engagement itself subsisted. The defendant's incurable disease may also be shown in mitigation of damages;[64] and so, probably, his physical impotence or imbecility of mind. The defendant may rebut any testimony of high social position or wealth;[65] and, in short, introduce evidence on his part which may tend to reduce the damages, whether by

57. Gross v. Hochstim, 130 N. Y. S. 315, 72 Misc. 343.

58. Colburn v. Marble, 196 Mass. 376, 82 N. E. 28.

59. Houser v. Carmody, 173 Mich. 121, 139 N. W. 9; Clark v. Reese, 26 Tex. Civ. App. 619, 64 S. W. 783; Freeman v. Bennett (Tex. Civ. App.), 195 S. W. 238.

A requested instruction that evidence of fornication by plaintiff could be considered in mitigation of damages, is too broad, in not excluding fornication with defendant. Colburn v. Marble, 196 Mass. 376, 82 N. E. 28.

60. Fleetford v. Barnett, 11 Colo. App. 77, 52 P. 293; Colburn v. Marble, 196 Mass. 376, 82 N. E. 28.

61. Johnson v. Smith, 3 Pittsb. 184.

62. Miller v. Rosier, 31 Mich. 475.

63. Cooley, J., in Miller v. Rosier, *supra;* Hook v. George, 100 Mass. 331. But see Miller v. Hayes, 34 Ia. 496, which excludes evidence of such admissions on the plaintiff's part, when made since the commencement of the action.

64. Sprague v. Craig, 51 Ill. 288. Cf. Gulick v. Gulick, 41 N. J. L. 13.

65. Sprague v. Craig, *supra.*

way of exculpating himself, throwing the blame upon the plaintiff, or simply showing that the pecuniary loss to the latter through the failure of the match is less than represented.

The defendant cannot show that there was insanity in the plaintiff's family when he knew that at the time he made the promise,[66] or that the mother of the plaintiff was a prostitute.[67]

The jury may, when the circumstances warrant, take into consideration in assessing damages proof of an offer to renew and perform made prior to the beginning of a suit on the breach,[68] but damages cannot be mitigated by an offer to renew and perform after suit brought. It is clearly against the well-established general principle that evidence of facts occurring after the beginning of suit cannot be given in aggravation or mitigation of damages.[69]

§ 1301. Concluding Observations Upon the Action for Breach of Promise.

It is perceived that this action for breach of promise is anomalous; founded, theoretically, upon the law of contract; and yet, in respect of damages and certain other points, seeming to be grounded rather in tort. The aggravation of damages for seduction or for assailing the woman's good name in the pleadings partakes manifestly of the action in tort, and, in general, the damages in a suit for breach of promise to marry are of that punitory, vague, unliquidated character which we associate with remedies for private wrongs; all statements as to placing the injured party where he or she would have been with the contract fulfilled being quite inappropriate, and the main issue resolving itself into a computation of mental anguish and losses of opportunity, such as

66. Lohner v. Coldwell, 15 Tex. Civ. App. 444, 39 S. W. 591.

67. Spellings v. Parks, 104 Tenn. 351, 58 S. W. 126.

68. Carty v. Heryford, 125 F. 46 (considering, however, any change in the situation or habits of defendant during the delay). See Chapman v. Brown, 179 S. W. 774 (not by conditional offer).

69. Kendall v. Dunn, 71 W. Va. 262, 76 S. E. 454, 43 L. R. A. (N. S.) 556.

arithmetic cannot figure out with exactness. For mitigation of these damages, for defence generally, the effort at present quite frequent is to recriminate, as in divorce suits, the sexual relations giving more complexion to the legal proceedings than any mere agreement, as between A and B, to do a certain thing. In truth, the contract to marry, under our modern civilized rule of courtship, which regards the woman's word and will in a betrothment, instead of leaving her for a parent to dispose of, brings a contracting pair of opposite sexes into a certain close relation known as an engagement — a relation preliminary and probationary, as it were, with reference to marriage, and yet distinct. There is a contract to enter hereafter into a status; but there is an intermediate status created, meanwhile, which it is mutually understood shall influence the fulfilment of that contract. Hence we find, when suit is brought for breach of promise, matter of justification set up at one time with reference to the circumstances and terms of the contract; at another, with regard to misbehavior connected with the engagement. Thus is perceived the difficulty of treating the breach of promise to enter into closer sexual relations like a simple breach of contract at common law, where parties undertake, as between man and man, and apart from love and sentiment, to do a certain thing in the future.

§ 1302. Doubtful Policy of Such Actions.

On the whole, we may question whether this right to sue for breach of promise is not productive of more evil than good. It is admitted that only one sex makes practical use of such a remedy, though its logical application should be mutual; and of that sex, moreover, but few of the finer grained. It is admitted, too, that the marriage state ought not to be lightly entered into; that it involves the profoundest interests of human life, transmitting its complex influences direct to posterity, and invading the happiness of parents and near kindred; that the step once taken is well-nigh irrevocable. From such a standpoint we view the marriage en-

gagement substantially as a period of probation for both parties — their opportunity for finding one another out; and if that probation results in developing incompatibility of tastes and temperament, coldness, suspicion, an incurable repugnance of one to the other, though all this may impute no vice to either, nor afford matter for judicial demonstration, duty requires that the match be broken off. What, then, shall be the consequence to the party who conscientiously takes the initiative? Analyze our reported breach of promise cases, and we shall see that the fair plaintiff is frail on the point most essential to womanly self-respect, in the majority of instances: that she has unwisely granted to her lover the indulgences of a husband; or that she was a soiled dove when he offered himself; or, more brazen still, that she has been loose with other men while plighted in affection. That the man's virtue, in such cases, will usually bear comparison, we need not contend, since in practice it is not he that invites litigation. In the interests of morality, then, and for the sake of compensating the innocent few who complete this record,[70] and whose vows, moreover, were made in a befitting spirit,[71] should so much festering corruption be yearly exposed to a jesting community, under the misnomer of a blighted affection, and jealousy exact her blackmail? Are the fallen victims of passion to represent the victims of exalted love? Courts have found it necessary, of late, to insist emphatically that a man is not bound by a contract to marry a lewd woman which he entered into in ignorance of her character.[72] This stricture, however, by no means debars all the lewd women from suing for breach of promise, nor even all the impenitent.[73] And however honorably one may have acquitted himself of an imprudent engagement before its consummation, the right which is conceded him by law, of showing a justification by way of miti-

70. Like the plaintiff in Homan v. Earle, 53 N. Y. 267.

71. As, *semble*, was not the case in Miller v. Rosier, 31 Mich. 475.

72. Von Storch v. Griffin, 77 Pa. St. 504.

73. See, for instance, Sheahan v. Barry, 27 Mich. 217; Sprague v. Craig, 51 Ill. 288.

gating damages, does not cover the case; for, letting alone the difficulty of proof, most men would rather pay hush-money than have the whole story of a love-folly trumpeted in the newspapers.

Seduction furnishes another, and, properly speaking, quite a distinct case from the loss of a marriage opportunity. For this offence, so revolting to every instinct of manly honor, a moral and physical wrong, accompanied by social degradation, renders it proper that the victim should have some right of action. For the common law and the common sense of mankind unite in treating the man as more culpable than the woman in such a case, and the woman as more grievously ruined than the man. But instead of taking seduction as the time-honored appendage to breach of promise and other collateral suits,[74] it seems fitter, as some of our States now provide by law, to make seduction a distinct and independent ground of action.[75] Where, too, a man, whether under promise to marry or not, gets a woman with child, she should have some sort of legal recourse for the child's sake, if not her own. In this latter case, and, indeed, in the former, a criminal magistrate will feel that the law does its best when, by a judicious exercise of influence, he can prevail upon the guilty pair, no impediment existing, to unite in marriage.

§ 1303. Actions Growing in Disfavor.

Actions for breach of promise of marriage are growing in disfavor with the courts, as they are recognized as a frequent exercise of blackmail, as claims are often made by designing women of the world where no promise has been made or where some promise has been induced by experienced women from inexperienced men. In either case it is well known that most men will pay something rather than face the ignominy of a trial, and suits are brought for this purpose by such women, while the sort of women who are really entitled to recover will as a general rule never bring their

74. *Supra*, § 1298. 75. Cates v. McKinney, 48 Ind. 562.

troubles before the court. A good example of the feeling of the courts is a recent Maine case, where a verdict of $116,000 was set aside on appeal because the plaintiff's evidence was incredible.[76-77]

76-77. Garmon v. Henderson (Me.), 95 A. 409.

CHAPTER II.

SEPARATION AND SEPARATE SUPPORT.

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§ 1304. Separation in General.

Separation is that anomalous condition of a married pair which involves a cessation of domestic intercourse while the impediments of marriage continue. Either from choice or necessity, as the case may be, they throw aside the strong safeguards of a home and mutual companionship; they forfeit their most solemn obligations to protect, love, and cherish through life; they continue united in form and divided in fact. The spirit of the contract, all that

dignifies and ennobles it, is gone; but the letter remains. Both parties submit, in some degree, at least, to the degradation of public scandal; they are cast loose upon the world without the right to love and be loved again; the thought of kindling fresh flames at the altar of domestic happiness is criminal; and deprived of the comfort and support of one another, finding in society at best but timid sympathy and consolation, the moral character must be strong, and doubly so must be that of the wife, that each may buffet with success the tide which bears onward to destruction. Such a state of things no public policy can safely favor; but the law sometimes permits it, if for no other reason than that an adequate remedy is wanting to check or to prevent the evil; and hence it may be thought more expedient for the courts to enforce such mutual contracts of the unhappy pair as mitigate their troubles, than to dabble in a domestic quarrel and try to compel unwilling companionships.

This we conceive to be the rightful position of the English and American equity courts whenever they see fit to enforce separation agreements. Some, to be sure, are disposed to carry the argument further. Thus, recent English writers of much repute refer to the fact that divorces from bed and board are often granted in that country, and hence conclude that it is reasonable for the married parties themselves to compromise litigation, save court fees, and avoid public notoriety, and therefore to agree to live apart, just as though the court had entered a decree for that purpose.[78] But this argument proves too much; for if marriage and divorce are matters for private compromise, like ordinary contracts, why should not the discontented pair, upon just cause, agree to unloose the yoke altogether? Why should they not sometimes obtain divorce from the bonds of matrimony by collusion and default, and thus take the readiest means of avoiding scandalous and expensive suits? One shrinks from such conclusions. In fact, divorce laws

78. Macq. Hus. & Wife, 324 *et seq.* See also Jacob *n.* to Roper Hus. & Wife, 277; Peachey Mar. Settl. 647.

do not belong to the parties themselves, but to the public; government guards the sanctity of marriage, just as it demands the duty of allegiance; only that perhaps its policy cannot be enforced in the one case as well as the other. It is because marriage is not on the footing of ordinary contracts, that husband and wife cannot, on principle, compromise, arbitrate, or modify their relationship at pleasure. Furthermore, the above argument would seem to suggest that where a complete divorce, instead of divorce from bed and board, is attainable, deeds of separation would not hold good; nor, again, where parties separate for causes which do not even justify divorce from bed and board; neither of which positions is sustained by the actual decisions.

§ 1305. Separation Deeds; Their History in England.

Lord Eldon was of the opinion that a settlement by way of separate maintenance, on a voluntary separation of husband and wife, was against the policy of the law and void. The ground of his opinion was that such settlements, creating a separate maintenance by voluntary agreement between husband and wife, were in their consequences destructive to the indissoluble nature and the sanctity of the marriage contract; and he considered the question to be the gravest and most momentous to the public interest that could fall under discussion in a court of justice.[79] But in England final and complete dissolution of marriage was, until modern times, attainable only by act of Parliament. And this method of procedure was found so difficult, expensive, and uncertain, that parties who could not live peaceably together were led to consider some lesser means of mitigating their misfortune. To be sure, the ecclesiastical courts awarded sentences of divorce from bed and board; but these merely discharged the parties from the duty of cohabitation, permitting them to come together afterwards if they

79. St. John v. St. John, 11 Ves. 530. See Mortimer v. Mortimer, 2 Hag. Consist. Rep. 318; Legard v. Johnson, 3 Ves. 352; Mereein v. People, 25 Wend. 77.

should so choose; and therefore, as a writer observes, these sentences "did not often, it must be owned, repay the pains bestowed in obtaining them." [80] The English ecclesiastical courts steadily refused, moreover, to recognize separation deeds.[81] Such a policy seems, however, to have turned husband and wife to their own devices for effecting the same result, with less delay and annoyance, and in order to adjust more completely those property arrangements which never could be forgotten in their misery. Deeds of settlement, trusts, and the intervention of the equity courts, readily furnished a plan of operations; and the ubiquitous conveyancer appeared once more upon the stage to open the way, through subtle refinements, to freedom for discontented couples, and emolument for himself.

After a prolonged struggle, and in spite of public policy, it is therefore fully established at length in England, as a doctrine of equity, that deeds of separation may and must, if properly framed, be carried into execution by the courts.[82] They may be enforced in the common-law courts indirectly through the medium of covenants which are entered into between the husband and trustees; and in equity specific performance will be decreed where the stipulations are not contrary to law nor in contravention of public policy.[83] An agreement between husband and wife to live apart is perhaps void as against public policy; but the husband's covenant with a third party may be valid and binding, although it originates in this unauthorized state of separation and relates directly to it.[84]

80. Macq. Hus. & Wife, 326. See Hope v. Hope, 3 Jur. (N. S.) 456; s. c., 26 L. J. Eq. 425; Peachey Mar. Settle. 620; H. v. W., 3 Kay & Johns. 386, 387.

81. 1 Bish. Mar. & Div., 5th ed., § 634; Mortimer v. Mortimer, 2 Hag. Con. 310; Smith v. Smith, 4 Hag. Ec. 609.

82. Wilson v. Wilson, 1 Ho. Lords Cas. 538; 5 Ho. Lords Cas. 59; Peachey Mar. Settl. 620, and cases cited; Macq. Hus. & Wife, 329.

83. Vansittart v. Vansittart, 2 De Gex & Jones, 249; *post*, § 1312.

84. Worrall v. Jacob, 3 Mer. 255; Peachey Mar. Settl. 621; Sanders v. Rodney, 16 Beav. 211; Warrender v. Warrender, 2 Cl. & Fin. 488.

It may seem strange that such an auxiliary agreement should be enforced, while the principal agreement is held contrary to the spirit and policy of the law. Lord Eldon, who strongly opposed the whole doctrine on principle, said that if the question were *res integra,* untouched by *dictum* or decision, he would not have permitted such a covenant to be the foundation of a suit in equity.[85] Sir William Grant appears to have been the first to call attention to the inconsistency of the courts in this respect; and his remark has come down through the later judges.[86] Lord Rosslyn, however, hit upon the explanation that an agreement for a separate provision between the husband and wife alone is void, merely from the general incapacity of the wife to contract:[87] an explanation which, we submit, is quite unsatisfactory. The true reason for the anomalous distinction appears to be simply this: that contracts for separation are in general void as against public policy, but that the courts saw fit to let in exceptions so far as to enforce fair covenants.

§ 1306. Separation Deeds in the United States.

Deeds of separation were never very common in the United States. And there are at least three very good reasons why they should be at this day less encouraged than in England. The first is that our legislation strongly favors the separate control of married women as to their own acquisitions, without the intervention of trustees and formal deeds of settlement, thus dispensing with the necessity of intricate property arrangements. The second is that equity, ecclesiastical, and common-law functions are usually blended in the same courts of final appeal, so that a State is at liberty to adopt the precedents of the ecclesiastical rather than the modern equity tribunals of England for its guidance; while an American court, on the other hand, could not admit clearly the

85. Westmeath v. Westmeath, Jac. 126; 2 Kent Com. 176.

86. See Jones v. Waite, 5 Bing. 361; Frampton v. Frampton, 4 Beav. 293.

87. Legard v. Johnson, 3 Ves. Jr. 352. See 2 Bright Hus. & Wife, 306, *n.* by Jacob.

right of parties to declare terms of private separation, without bringing confusion and uncertainty upon its own divorce and matrimonial jurisdiction. The third is that sentences of divorce have been procured in most of the United States with great ease, moderate expense, and little publicity.

Early in this century, Chancellor Kent summed up authorities which showed that a private separation was an illegal contract, in these emphatic words: "Nothing can be clearer or more sound than this conjugal doctrine." [88]

In this country agreements between the spouses to live apart are generally regarded as void as against public policy,[89] but they are sustained in England; [90] but even there a wife may obtain a divorce for desertion notwithstanding a separation agreement where the husband runs off with another woman.[91]

Nevertheless there are individual American cases, and numerous ones, where separation deeds have been recognized so far as to permit and sometimes to require parties to perform such marital duties as were incumbent upon them, notwithstanding the fact of separation.[92] And the text-writer must still further concede, however reluctantly, that out of a regard for permitting married parties who are resolved upon separation without a divorce to arrange decently for the maintenance of wife and offspring, and for a just mutual disposition of property rights, our courts are in the latest cases following the English lead so as to sustain the enforcement of whatever covenants might be pronounced fair in themselves on

88. 2 Kent Com. 177 *n*.

89. Aspinwall v. Aspinwall, 49 N. J. Eq. 302; Collins v. Collins, 1 Phill. N. C. Eq. 153.

90. Besant v. Wood, 12 Ch. Div. 605.

91. Smith v. Smith, 60 Sol. L. J. 25.

92. Read v. Beazley, 1 Blackf. 97; Bettle v. Wilson, 1 Ohio, 257; Goodrich v. Bryant, 4 Sneed, 325; McCubbin v. Patterson, 16 Md. 179; Beach v. Beach, 2 Hill, 260; Griffin v. Banks, 37 N. Y. 621; Joyce v. McAvoy, 31 Cal. 273; Walker v. Stringfellow, 30 Tex. 570; Hitner's Appeal, 54 Pa. St. 110; Loud v. Loud, 4 Bush, 453; Dutton v. Dutton, 30 Ind. 452; Robertson v. Robertson, 25 Ia. 350; McKee v. Reynolds, 26 Ia. 578; Magee v. Magee, 67 Barb. 487; Walker v. Beal, 3 Cliff. 155; Dupre v. Rein,

behalf of parties separated or about to separate. Some of these cases sustain such covenants upon a suggestion that, separation being inevitable, they are prepared to make the best of it, not conceding the support of contracts calculated to favor a separation which has not yet taken place or been fully decided upon.[93] An unsatisfactory distinction truly, nor one likely to afford a resting place; as though this half countenance were not calculated of itself to favor future separation; and yet a legal distinction. It seems to stop short of enforcing specific performance of a written agreement for a separation deed, and to refuse direct countenance to a stipulation that husband and wife shall live apart in time to come.

§ 1307. Same Subject; Intervention of Trustees.

An indenture with the intervention of a trustee or trustees is in this country held the safer sort of instrument where separation is contemplated, and such are the deeds usually drawn and construed by our courts. It is desirable that the husband and trustee mutually covenant together. But so considerably are husband and wife now emancipated from the need of intermediate parties, that a fair transaction of the present nature has been sometimes sustained in certain States, where no trustee at all was interposed.[94] This cannot be affirmed of all, nor of most of the United States;[95] nor can such a contract ever prevail against the wife's interests where she, in such negotiation and arrangements, does not appear to have acted with perfect freedom and a perfect understanding

56 How. N. Y. Prac. 228; Deming v. Williams, 26 Conn. 226; Chapman v. Gray, 8 Ga. 341.

93. Fox v. Davis, 113 Mass. 255, per Endicott, J., and cases cited; Hutton v. Hutton, 3 Barr. 100; Randall v. Randall, 37 Mich. 563, per Cooley, C. J.; Garver v. Miller, 16 Ohio St. 527; Robertson v. Robertson, 25 Ia. 350; Wallace v. Bassett, 41 Barb. 92; Magee v. Magee, 67 Barb. 487; Dutton v. Dutton, 30 Ind. 452.

94. In Randall v. Randall, 37 Mich. 563, a deed passed from husband to wife, whose actual consideration was relinquishment of the right to support on her part.

95. Simpson v. Simpson, 4 Dana, 140; Carter v. Carter, 14 Sm. & M. 59; Stephenson v. Osborne, 41 Miss.

of her individual rights.[96] Sometimes an agreement or bond to separate is executed by husband and wife, accompanied by the conveyance of property to a trustee for the use of the wife; which latter, however, is the instrument the court construes and upholds.[97]

Husband and wife may make a valid contract of separation in the District of Columbia without the intervention of a trustee under the Code.[98]

§ 1308. Property Rights During Separation.

Where the husband has the possession of a farm of which his wife holds the legal title, it is a question of fact whether he holds as her tenant or as her agent. If the husband and wife have separated and the husband continues to manage her farm, and if there is no evidence that he is her agent, the only conclusion which can be reached is that he occupied as her tenant, and no other contract being shown, it must be held that he occupied as tenant at will. As such he may maintain trespass against a third party who enters and takes the crops.[99]

§ 1309. Separation Deeds; What Provisions Are Supported.

Inasmuch, then, as separation deeds are not enforced either in England or the United States, at the present day, without regard to the policy of stipulations or covenants in question, the limit of judicial support may be drawn at the support of provisions which, supposing separation inevitable, carry the fulfilment of conjugal duties and rights after a reasonable and becoming manner into that relation. For equity can only sanction what is fair and beneficial; and here cognizance is taken, not of the separation, but of circumstances and a settlement attending that state. The cove-

119; McKennan v. Phillips, 6 Whart. 571.

96. Switzer v. Switzer, 26 Gratt. 574.

97. Keys v. Keys, 11 Heisk. 425; Dixon v. Dixon, 23 N. J. Eq. 316.

98. Santmyer v. Santmyer (D. C. App.), 47 Wash. Law Rep. 34.

99. Evans v. Watkins, 76 N. H. 433, 83 A. 915, 41 L. R. A. (N. S.) 404.

nant or stipulation itself, the whole settlement, must be free from exception and such as equity might, under other instances of its jurisdiction, have sustained.[1] Where, therefore, the provision is for the benefit of wife and children, as in providing suitable maintenance during the separation, such a covenant or stipulation is to be highly favored.[2] Where an equitable and suitable division of the property is made, whose benefits have been enjoyed during the coverture, this, too, may well be upheld.[3] The spouse who covenants to deliver up certain property to the other should make that covenant as advantageous to the latter as was reasonably intended.[4]

It is fair that a husband's covenant or stipulation of proper allowance for the wife's support should be accompanied by the trustee's covenant or stipulation of indemnity against his wife's debts.[5]

In respect of directly compelling the married parties to live apart under their agreement, separation deeds cannot be pronounced good upon any just conception of public policy and the divorce laws. The language of Lord Brougham in *Warrender* v. *Warrender* is emphatic on this point.[6] American cases are to the same purport;[7] and especially must this rule hold true where the

1. Switzer v. Switzer, 26 Gratt. 574.

2. Fox v. Davis, 113 Mass. 255; Randall v. Randall, 37 Mich. 563; Walker v. Walker, 9 Wall. 743.

3. Cooley, C. J., in Randall v. Randall, 37 Mich. 563.

4. Thus, it is held that a husband has no right to retain copies of his wife's journals and diaries which he, under a separation deed, has covenanted to deliver up. Hamilton v. Hector, L. R. 13 Eq. 511. And see McAllister v. McAllister, 10 Heisk. 345.

5. Dupre v. Rein, 56 How. (N. Y.) Prac. 228; Harshberger v. Alger, 31 Gratt. 52; Reed v. Beazley, 1 Blackf. 97. Such a provision of indemnity though usual, is not essential. Smith v. Knowles, 2 Grant, 413.

6. Warrender v. Warrender, 2 Cl. & F. 488, 527, per Lord Brougham. Where a legacy is left to a married woman on condition that she shall live apart from her husband, the condition is contrary to good morals and void. Brown v. Peck, 1 Eden, 140.

7. McCrocklin v. McCrocklin, 2 B. Monr. 370; McKennan v. Phillips, 6 Whart. 571, per Gibson, C. J.

compulsion sought is under circumstances of separation not justifying a divorce.

§ 1310. Whether Separation Deeds Bar Divorce Proceedings; Effect of a Spouse's Guilt.

There is a general opinion, founded in sound policy, that articles of separation are no bar to proceedings for divorce for subsequent cause, as if one of the parties, after their execution, should commit adultery.[8] Nor, as held in Maryland, does a separation deed bar proceedings for divorce for impotency, which, properly speaking, is a cause accruing before the separation took place.[9] The discovery, after the execution of a deed of separation, that a spouse had been previously guilty of adultery, moreover, would not debar the innocent spouse from claiming rights of which that spouse had been kept in ignorance.[10]

Nor should a deed of separation be so construed as to deprive one spouse from returning to defend a suit for divorce brought by the other.[11] If separation deeds should ever become, with judicial sanction, permissive of conjugal unfaithfulness, and obstructive of the usual remedies of an injured spouse, recognized by the legislature, bigamy and adultery will have gained a firm bulwark in the community.

It is held, and probably out of favor to a wife who is thus deprived of the shield to her honor she most needs, that a settlement, unqualified in terms, made by the husband to a trustee for the use of his wife, on the execution of articles of separation between them, will not be set aside on her subsequent adultery while living apart from him,[12] nor even though for that adultery

8. Stokes v. Stokes, 1 Mo. 324; Rogers v. Rogers, 4 Paige, 516.

9. G. v. G., 33 Md. 401.

10. Morrall v. Morrall, L. R. 6 P. D. 98.

11. Marlow v. Marlow, 77 Ill. 633. Nor can terms of separation defeat a wife's claim for alimony. Wilson v. Wilson, 40 Ia. 230.

12. Dixon v. Dixon, 23 N. J. Eq. 316; 24 N. J. Eq. 133. But had she been shown adulterous before execution of the deed, and the husband afterwards found it out, this might per-

he finally procured a divorce.[13] Any provision for maintenance under a separation deed is, as we have elsewhere seen,[14] now considered in England a provision in full of the wife's necessaries; and the wife cannot, even though needy, pledge her husband's credit further, independently of his permission.[15]

But adultery of the one, and cause for divorce to the other, may put a new face upon this matter of maintenance. And it is held in England that the separated wife, having discovered that her husband had been guilty of incestuous adultery, and having obtained a decree for divorce on that ground, was entitled to the usual order for permanent alimony; and this, notwithstanding that under the separation deed she agreed to accept certain sums as a provision for her support, and not to sue her husband for any further maintenance.[16] For all such deeds should be construed in the light of the status originally contemplated.

It is in this country an implied condition of a separation agreement under which a husband is to pay the wife's support that she shall remain chaste, and her adultery is a defence to an action for these payments.[17] The English rule is that the adultery of the wife while living apart from the husband under a separation agreement does not prevent her from recovering the payments stipulated to her by that agreement unless the agreement states specifically that she shall remain chaste.[18] The reason for this rule seems to be that in England the framing of such agreements is by custom in the hands of skilled solicitors who use forms providing for the chastity of the wife as one of the conditions of the payments, and the courts have taken the stand that the omission of

haps be considered fraudulent inducement to the conveyance.

13. Charlesworth v. Holt, L. R. 9 Ex. 38.

14. *Supra*, § 103.

15. Eastland v. Burchell, L. R. 3 Q. B. D. 432.

16. Morrall v. Morrall, L. R. 6 P. D. 98.

17. Devine v. Devine (N. J.), 104 A. 370.

18. Baynon v. Bateley, 8 Bing. 256; Sweet v. Sweet, L. R. 1895, 1 Q. B. 12.

this clause is clear evidence that the parties did not intend the payments to be governed by any such condition.[19]

§ 1311. Legal and Illegal Conditions in Separation Deeds; Remedies.

The potential mingling of legal and illegal conditions in these agreements, with the view of entering upon a status which of itself is inconsistent with a due fulfilment of the moral and legal duties of matrimony, occasions judicial confusion, which is more likely to increase than decrease while separation deeds are judicially recognized. But it is held in England that if some covenants in such a deed are legal and proper, while others are not, the former are enforceable by themselves.[20] And trifling breaches on the part of one spouse have moreover been sometimes disregarded, in order that the main purposes of the compact might be executed against another spouse whose fault it was that the separation became originally resolved upon.[21]

In New York it is held that a husband and trustee having mutually covenanted under a separation deed, the latter may bring an action alone for the former's breach. But in such an action all facts by way of inducement should be stated in the complaint; and simply to set forth the agreement, and declare a breach of it for failure to pay, is not good pleading.[22]

§ 1312. Effect of Reconcilement on Separation Deeds, or Failure to Separate.

Should the separated parties come together after a separation under articles, the consideration of those articles fails, and an immediate end is put to them;[23] supposing, of course, that the

19. Devine v. Devine (N. J.), 104 A. 370.

20. Hamilton v. Hector, L. R. 13 Eq. 511.

21. Besant v. Wood, L. R. 12 Ch. D. 605.

22. Dupre v. Rein, 56 How. (N. Y.) Pr. 228.

23. Shelthar v. Gregory, 2 Wend. 222; Wells v. Stout, 9 Cal. 479.

reconcilement is genuine, and not a pretext by the one spouse in order to deprive the other of legal rights.[24] And reconcilement taking place, the subsequent abandonment of one spouse by the other will not revive those articles.[25] But it is held that such deeds may distinctly provide that the articles shall continue in operation should the parties ever resume cohabitation; in which case it will not be suspended during, at all events, what proves only a temporary reconcilement.[26]

Where no separation actually took place, the deed of separation is wholly void.[27]

It is frequently said that reconciliation and resumption of the marital relation will render a separation contract void, but this is a loose and inaccurate statement. The truth is that having entered into a valid separation agreement the courts cannot and will not deem such contract avoided, unless the conduct of the parties impels to the conclusion that they themselves so regarded it. When the contract contains provisions for the wife which might with equal propriety have been made had no separation been contemplated, and others which would have otherwise been idle, the coming together again of the parties and their conduct may be such as to show an intention to avoid the latter and not the former. So where the agreement for separation includes a division of property which might have been made if no separation had taken place the reconciliation does not abrogate this division.[28]

Where the parties have separated due to the fault of one, and they become reconciled under an agreement that in case the guilty party gives further cause for divorce he shall pay a certain sum to the other, this contract is valid. It is not an inducement to sep-

24. Marlow v. Marlow, 77 Ill. 633.

25. Shelthar v. Gregory, 2 Wend. 222.

26. Walker v. Beal, 3 Cliff. 155. This case goes very far. The temporary reconcilement lasted fourteen years.

27. Hamilton v. Hector, L. R. 13 Eq. 511. See Pride v. Bubb, L. R. 7 Ch. 64.

28. Dennis v. Perkins, 88 Kan. 428, 129 P. 165, 43 L. R. A. (N. S.) 1219.

arate, but an additional penalty on further misconduct, and is an additional inducement to the parties to reconcile their differences.[29]

A bond by a husband to a wife by way of compromise of matrimonial difficulties binding the husband to renew his matrimonial obligations and live with and support his wife and family is based on a sufficient consideration, and is not forbidden by public policy.[30]

§ 1313. English Doctrine Upholds Separation Deeds.

While in many parts of the United States is seen an increasing tendency to adopt the English theory concerning separation covenants, with, however, more looseness as to the form such transactions shall take, the latest English cases quite transcend the distinctions behind which our courts take refuge, and the earlier *dicta* of their own Eldon and Brougham. Divorce being there regarded with less favor than in the United States, notwithstanding the late statutes on the subject, trust deeds and voluntary separation are upon mature experience treated as, on the whole, the more decent and respectable method for unhappy couples to adopt, than that somewhat novel recourse to courts, which brings a scandalous cause into public controversy.[31] English policy, indeed, in its inception

29. Bowden v. Bowden, 175 Cal. 711, 167 P. 154, L. R. A. 1918A, 380; Hite v. Hite, 136 Ky. 529, 124 S. W. 815; Duffy v. White, 115 Mich. 264, 73 N. W. 363; Burkholder's Appeal, 105 Pa. 33; Sommer v. Sommer, 87 App. Div. 433, 84 N. Y. Supp. 444.

Where the parties are living apart an agreement is valid which provides for a fixed sum per week to be paid to the wife on reconciliation, and, further, that if they separate again on account of the husband's wrongdoing, he shall pay for her comfortable maintenance, as this is not an agreement to separate and will be enforced where the wife does actually leave the husband later on account of a cause which is a valid ground for divorce. Terkelsen v. Peterson, 216 Mass. 531.

30. Bolyard v. Bolyard, 79 W. Va. 554, 91 S. E. 529, L. R. A. 1917D, 440.

31. A modern text-writer of England alluding to the new divorce acts of 20 & 21 Vict., ch. 85, 21 & 22, Vict., ch. 108, which extend the facilities of legal separation upon the American plan, admits that under those statutes "a more effectual separation can be obtained than under a simple deed or agreement to live apart." But, as he proceeds to observe, deeds of separation may yet be preferred, since they are available

is quite different from American in this regard, a fact which American jurists should bear well in mind. And under legislation of date much later than the divorce acts which were copied from the United States, separation deeds are plainly legalized.[32]

§ 1314. Custody of Offspring Under Modern English Separation Deeds.

Thus, the custody of the offspring may now be distinctly provided for, as it would appear, in an English deed of separation. But at the same time chancery, where the child is made a ward of the court, will protect the child's welfare.

There is a recent case in point which attracted much attention from the public relations of the parents. The father was a clergyman of the Church of England; the mother an atheist; and separation was caused by the latter spouse's peculiar religious and social opinions. The separated mother afterwards wrote and published a book of an obscene character (so the court held), among other things recommending checks on the increase of population. The daughter was to be left with the mother, under the separation deed, for eleven months of the year; but, besides offending by this publication, the mother refused to let the child receive a religious education. Accordingly a next friend of the infant removed the daughter from the mother's custody, and had her made a ward of the court, when she was about eight years old. The Court of Chancery held that to bring the child up in her father's religion was a duty, and that the authorship of the obscene book was good reason, under the circumstances, for removing the child from the mother's custody.[33] Nor was such removal of the child from her mother's custody considered a suable breach of the

for purposes which do not justify a legal grant of separation; so, too, "even in those instances in which the court affords relief, many, if not most persons, will prefer quietly arranging their differences by deed to painful discussions in a public court of justice." Peachey Mar. Settl. 647, 648.

32. Stat. 36 & 37 Vict., cited in *Re* Besant, L. R. 11 Ch. D. 508

33. *Re* Besant, L. R. 11 Ch. D. 508.

husband's covenant, in this case, notwithstanding the friend of the infant removed her with the father's concurrence.[34]

§ 1315. Effect of Separation Deeds on Rights in Divorce.

On sound principles, as we have contended, a separation deed ought not to debar the separated parties from procuring a divorce, or legal separation, upon sufficient cause duly arising. American courts certainly shrink from recognizing anything like a private right by mutual consent to relax the marriage ties or dissolve the marriage compact.[35] But where, in the instance just noticed, the husband had enforced the separation deed for the purposes of separation, and the wife set up by counterclaim that she was entitled to a judicial separation, chancery ruled that the wife was barred by lapse of time and the deed of separation from doing so.[36]

Where husband and wife make a valid agreement for separation and the support of the wife by the husband as long as both shall live, this can only be rescinded by mutual agreement or by express adjudication in a proper proceeding. The mere allowance of temporary or permanent alimony in the absence of an express adjudication respecting the contract would not affect its subsequent validity. Implied adjudication affecting the agreement will not be presumed from the silence of the decree on the subject of alimony.[37]

Married persons may agree to live separate and apart from each other, because it is their privilege to live in that manner so long as they mutually desire to do so, and the husband's agreement to support his wife during that period of time is in harmony with his lawful duty; but an agreement of separation cannot confer on either party the right to live away from the other against the will of the other. By policy of the law the period for which they thus contract touching their separation is limited to the period of their

34. Besant v. Wood, L. R. 12 Ch. D. 605.

35. *Supra*, § 1310.

36. Besant v. Wood, L. R. 12 Ch. D. 605.

37. Santmyer v. Santmyer (D. C. App.), 47 Wash. Law Rep. 34.

future mutual assent to live apart. Accordingly, in the absence of wrongdoing on the husband's part, he may require his wife's return to his bed and board, and her refusal will not only constitute her an obstinate deserter, but will deny to her any right to support from him, notwithstanding the existence of an agreement wherein they have mutually stipulated to live apart.[38]

§ 1316. English Suit for Restitution of Conjugal Rights; Whether Separation Deed Bars.

Upon still another point, namely, the restitution of conjugal rights, the English chancery has, of late, departed widely from its earlier precedents. In Great Britain, where this suit for restitution of conjugal rights has always been permitted, it was formerly ruled in the matrimonial courts, and seemed to be the well-settled doctrine, that a deed of separation afforded no bar to such a suit whenever either party chose to enforce the remedy; and this, even though the deed in terms forbade such proceedings.[39] This was in accordance with the first idea that separation deeds should indirectly be tolerated for their beneficial covenants as concerned parties bent upon separation, but not directly upheld. That rule has changed; for, as the English statute now provides, a deed of separation which contains a covenant forbidding the suit for restitution of conjugal rights to be brought will bar such a suit.[40] And to one separated spouse chancery will now grant an injunction, by virtue of such a covenant, to restrain the other spouse from suing for restitution of conjugal rights.[41] Compromise, too, of

38. Devine v. Devine (N. J.), 10 A. 370.

39. Mortimer v. Mortimer, 2 Hag. Con. 310; Smith v. Smith, 4 Hag. Ec. 609; Warrender v. Warrender, 2 Cl. & F. 488, 561; Spering v. Spering, 3 Swab. & T. 211; Anquez v. Anquez, 1 P. & M. 176.

40. Marshall v. Marshall, 39 L. T. 640.

41. Besant v. Wood, L. R. 12 Ch. D. 605, and cases cited. Under the English divorce act of 20 & 21 Vict., ch. 85, suits for restitution of conjugal rights are still permitted. In Hunt v. Hunt, De G. F. & J. 221, 225, it appears that a decree of the English Master of the Rolls was reversed by the Lord Chancellor in favor of such a doctrine as that stated in the

the suit for restitution of conjugal rights, is permitted in England.[42]

There is this fundamental distinction between the English suit for divorce or judicial separation, and the suit for restitution of conjugal rights: that in the former instance the chief object is to free the petitioner in whole or in part from the marriage obligations; but in the latter to control the other spouse so as to compel once more an unwilling cohabitation.[43] Restitution of conjugal rights is a remedy unknown in the United States, where courts may finally part, but cannot forcibly reunite, the separated spouses.

§ 1317. Latest English Rule as to Specific Performance of Covenants to Separate.

A modern English chancery court will furthermore enforce specific performance of a written agreement for a separation deed made between husband and an interested third person, such as his wife's father. It is not probable that such a rule obtains in any part of the United States; and certainly no such decisions to that effect are to be found.[44]

§ 1318. Rights of One Separated Spouse upon the Decease of the Other.

The doctrine of election has been applied to rights accruing under a deed of separation. Thus, where the husband covenanted to pay a fixed annual allowance to his separated wife, and subse-

text; appeal was taken to the House of Lords, but the wife died after argument and no decision was ever rendered. Rowley v. Rowley, L. R. 1 H. L. Sc. 63.

42. Stanes v. Stanes, L. R. 3 P. D. 42. As to compromising a divorce suit, see Divorce, *post*, § 1479.

43. See language of court in Firebrace v. Firebrace, 39 L. T. 94. In the English suit for restitution of conjugal rights, the husband or wife makes formal complaint of the delinquent partner. A decree, as for instance on the wife's petition, requires the husband to receive her back and to treat her with conjugal affection; and should the husband refuse obedience in both respects, he will be declared in contempt, and imprisoned until he obeys.

44. Gibbs v. Harding, L. R. 5 Ch. 336.

quently, by will, gave her precisely the same allowance thus settled upon her, and died before her, it was held that she, as his widow, could not receive both sums, but must elect between the allowance payable under the will and that under the deed.[45]

On the death of a wife living apart from her husband under a deed of separation, administration can be taken on her estate, and assets are recoverable by the legally appointed administrator, even though it be from the husband himself, in order that her debts be paid.[46] Dower and curtesy are not barred, as a rule, by separation; but by certain statutes, where husband and wife have involuntarily separated, or the wife willingly lives apart from the husband or in adultery, and no subsequent reconciliation takes place, the widow cannot claim dower in her deceased husband's lands.[47]

§ 1319. Separate Support; Nature of Action.

There is a sort of equitable relief which courts afford to a married woman who lives apart from her husband because of his fault. This is known as the wife's separate maintenance. Local statute extends this relief, which is of chancery origin, and gives it a scope in these days correspondent to our married women's legislation. Where a wife, for instance, has been forced to leave her husband *because of his misconduct,* she may come into equity to have secured to her a fair proportion of the rents and profits from land acquired by her since marriage and in his possession:[48] or she may procure the aid of a court of equity in getting possession of such chattels as she may have contributed to the furnishing and adornment of the home.[49] In general, if a wife is abandoned by her husband, or refused cohabitation, without fault on her part, and being left without adequate means of support, a bill in equity

45. Atkinson v. Littlewood, L. R. 18 Eq. 595.

46. McLaren v. Bradford, 52 Ga. 648.

47. McAlister v. Novenger, 54 Mo. 251. See *post*, § 1427.

48. Corley v. Corley, 8 Baxt. 7.

49. Black v. Black, 30 N. J. Eq.

will lie to compel the husband to support her, without asking for or procuring a decree of divorce.[50]

§ 1320. Separate Support; Venue of Action.

The venue of a suit for maintenance without divorce is in no wise controlled by the statute in relation to jurisdiction in divorce suits. The place of suit is governed by the laws applying to ordinary suits for the vindication of legal or equitable rights. The divorce statutes do not relate to an independent suit for maintenance and cannot control it.[51]

§ 1321. Separate Support; Fault of Parties.

Whatever the mode or extent of relief thus afforded, the rule is that the wife will not be entitled to a decree of maintenance unless she can make out a case which would have justified a decree of judicial separation.[52]

Where the wife fails to prove her complaint in an action for separate support the court has no right to award her the custody of the children or to make a decree for their support. It would be an anomaly to allow a complainant who had failed to establish a claim to the principal relief sought to have a decree for the mere incidents of that relief. Otherwise, whenever a wife fails in her application for divorce she would have a right to separate maintenance. To return to her husband may involve some humiliation, but the defeated wife took that chance when she went into court and made charges against her husband which she was unable to sustain. She has the assurance that if she returns and does her part he must do his, or the law will grant her relief.[53]

215. And see State v. Dill, 60 Mo. 433.

50. Garland v. Garland, 50 Miss. 694; Van Arsdalen v. Van Arsdalen, 30 N. J. Eq. 359; Douglas v. Douglas, 5 Hun, 140.

51. Lang v. Lang, 70 W. Va. 205, 73 S. E. 716, 38 L. R. A. (N. S.) 950.

52. Douglas v. Douglas, 5 Hun (N. Y.), 140; Black v. Black, 30 N. J. Eq. 215.

53. Towson v. Towson (D. C. App.), 47 Wash. Law Rep. 345.

But a statute authorizing the court to make orders for the support of the wife and children although separation is not decreed gives the court the right to make orders for support even though no facts are proved which entitle the parties to a divorce or separation, where they are actually living apart. The court remarks that "The children are not responsible for the unfortunate differences which have caused the estrangement and separation of the parents and ought not to suffer therefrom. Their rights do not depend on the degree of culpability of one or the other parent and their needs must be provided for whether the existing conditions have been brought about by the fault of one or the other or of both parents." [54] It is not enough that the separation was voluntary and by mutual assent,[55] or produced by the wife's own departure without sufficient cause. Nor can condoned misconduct of the husband be made the basis of her procedure.[56]

Statutes provide more specific separate relief to a married woman living apart from her husband "without her fault," [57] or where she is "deserted by" her husband; it may be sometimes by way of temporary alimony, or again of the beneficial use of property he has left behind him.[58]

A petition for separate maintenance will not be granted where it appears that the separation was the fault of both parties, as the wife to prevail must come into court with clean hands and prove that she has not by her own fault caused the separation. So where the separation was in part caused by the ill temper and constant nagging of the wife she will not be granted separate maintenance.[59]

The wife's adultery is a bar to a decree of judicial separation

54. Jacobs v. Jacobs, 136 Minn. 190, 161 N. W. 525, L. R. A. 1917D, 971.

55. Cooper v. Cooper, 4 Ill. App. 285.

56. Deenis v. Deenis, 65 Ill. 167.

57. Deenis v. Deenis, 65 Ill. 167.

58. Stanbrough v. Stanbrough, 60 Ind. 275.

59. Ivanhoe v. Ivanhoe, 68 Ore. 297, 136 P. 21, 49 L. R. A. (N. S.) 86.

Fault of wife as defence to separate maintenance. See long note in 49 L. R. A. 86.

on her petition even though her adultery has been condoned so that the husband has been refused a divorce.[60] But adultery by the wife with the collusion or consent of the husband is not such justifiable cause as relieves him from the duty of supporting her, and she may maintain a bill for support and maintenance against him. The husband cannot claim that her adultery is justifiable cause for relieving him from his duty when he has consented to it.[61]

§ 1322. Separate Support; Financial Ability of Parties.

The fact that the wife is not dependent on the husband for support is no bar to an action by her for non-support. To sustain such a defence would be to acquit those wrongdoers who may have married women with parents able to support them and to convict those wrongdoers who may have married women whose parents are poor.[62]

Under a statute requiring a man to support his family "according to his means" it is enough to show that he was a skilled workman able to earn fair wages had he been so disposed. It is not necessary for the complainant to show that he had actually been in receipt of money while absent from her, as "means" refers to the capacity to earn money as well as to property actually owned and possessed. This makes out a *prima facie* case, and the way is then open for the defendant to show that by reason of ill-health or inability to obtain employment he had been unable to earn money and to contribute to the support of his wife and child.[63]

§ 1323. Separate Support; Alimony Pendente Lite.

Alimony *pendente lite* is not properly allowed the wife who applies for separate maintenance.[64] But in some States, as inci-

60. Everett v. Everett (C. A.), 121 L. T. R. 503.

61. White v. White, 87 N. J. Eq. 354, 100 A. 235, L. R. A. 1917D, 639.

62. State v. English, 101 S. C. 304, 85 S. E. 721, L. R. A. 1915F, 977.

63. State v. Bartley, 38 R. I. 414, 96 A. 305, L. R. A. 1916D, 441.

64. Foss v. Foss, 2 Ill. App. 411; Angelo v. Angelo, 81 Ill. 251. The proceedings for maintenance authorized by the New York Law of 1871

dent to an action for support by one spouse against the other without divorce, and where it appears that probable cause for the suit exists, the court may make allowance for support and counsel fees pending the litigation. The court has also a right to make provision for future support, and the court's decree in amount should be measured by the means of the defendant as well as by the requirements of the plaintiff, and by all general rules usually governing in the granting of permanent alimony in divorce decrees, including such injunctional relief against alienation of property to defeat the objects to be attained by the action as the court may, on showing consider necessary.[65]

§ 1324. Separate Support; Property Rights.

The savings of money transmitted from time to time by a husband to his wife from whom he was living separate, for her maintenance and support, are held in equity to be her separate estate.[66]

An injunction will not be issued at suit of a wife for separate maintenance to enjoin the husband and his brother, who has certain personal property of the husband, from disposing of it, even though the husband is a drunkard and likely to dissipate it. The proper remedy is by proceedings for the appointment of a conservator. A husband cannot be enjoined from selling or disposing of his personal property at suit of his wife except in the ordinary course of business to insure payment of alimony allowed the wife. The limit of the power of the court to secure payment of alimony is to

is of a criminal nature, and not intended as a remedy for deserted wives, but a protection of the court against the expense of supporting paupers. Bayne v. People, 21 N. Y. Supr. 181.

65. Hagert v. Hagert, 22 N. D. 290, 133 N. W. 1035, 38 L. R. A. (N. S.) 966.

66. Brooke v. Brooke, 4 Jur. (N. S.) 472. It is admitted, says the court, that in law, if the husband claims it, it is his; (Messenger v. Clarke, 5 Ex. 388); but equity treats it as a fund needed possibly for her debts, and if the husband invokes its aid, the court will give it all to the wife as her equity to a settlement.

make the alimony decree a lien upon the real property of the husband.[67]

§ 1325. Vexatious Prosecutions for Non-Support Enjoined.

Although it is the general rule that equity will not enjoin a criminal prosecution, still there are certain exceptions to this rule, and one is to be noted in a case where a young couple had separated and the father of the wife started a series of criminal prosecutions against the husband for non-support under a statute which had already been declared unconstitutional. The court remarks: "If there be no precedent for the interference of a court of chancery in such a case it is time one should be made. Certainly the relief sought falls within the general scope of those equitable principles which entitle a citizen to protection against multiplied, repeated and vexatious suits." [68]

67. Peck v. Peck (Ill. App., 1919), 58 Nat. Corp. Rep. 419.

68. Alexander v. Elkins, 132 Tenn. 663, 179 S. W. 310, L. R. A. 1916C, 261.

CHAPTER III.

ABANDONMENT.

SECTION 1326. Effect on Civil Rights of Wife.
1327. Crime at Common Law and Under Statutes.
1328. Constitutionality and Effect of Statutes.
1329. Elements of Offence.
1330. Defences.
1331. Effect of Divorce.

§ 1326. Effect on Civil Rights of Wife.

Abandonment by either spouse consists in leaving the other wilfully and with the intention of causing their perpetual separation. As to the right of the wife, when abandoned by her husband, to earn, contract, sue, and be sued, to much the same effect as a *feme sole,* while such abandonment actually lasts, the current of American authority, legislative and judicial alike, decidedly favors so just a doctrine.[69] Modern Married Women's Acts, as we have seen, often permit the wife to do quite or nearly as much when not abandoned at all. And in England statutes secure to a married woman privileges to a similar extent under like circumstances of abandonment.[70] The test is, observes an American

69. See Shaw, C. J., in Abbott v. Bayley, 6 Pick. 89; Benedum v. Pratt, 1 Ohio St. 403; Spier's Appeal, 2 Casey, 233; Mead v. Hughes, 15 Ala. 141; Rhea v. Rhenner, 1 Pet. 105; Moore v. Stevenson, 27 Conn. 14; Smith v. Silence, 4 Ia. 321; Love v. Moynehan, 16 Ill. 277; Wilson v. Brown, 2 Beasl. 277; Abshire v. Mather, 27 Ind. 381; Stith v. Patterson, 3 Bush, 132; Harrison v. Stewart, 3 C. E. Green, 451; Frary v. Booth, 37 Vt. 78; Bean v. Morgan, 4 McCord, 148; Barnett v. Leonard, 66 Ind. 422. In Coughlin v. Ryan, 43 Misc. 99, the deserting husband's rights are excluded in the wife's separate property even after her death. And see the numerous statutes in almost every State in the Union, enlarging the rights of married women in such cases. The rule would not extend to suits for partition of lands held by husband and wife as tenants in common. McDermott v. French, 2 McCart. 78.

70. See Stat. 20 & 21 Viet., ch. 85; Midland R. R. Co. v. Pye, 10 C. B. (N. S.) 179. Chancery has long moulded its proceedings to secure a

case, whether the husband may be deemed to have renounced his marital rights and relations.[71]

The great contrariety of current legislation is a great obstruction, however, to formulating a decided rule of English and American jurisprudence on this point. We have seen that, under the old common-law doctrine of coverture, the wife could not sue or be sued, or otherwise act as a single woman, unless the husband was under the disability of a civil death, which meant originally banishment and abjuration of the realm. The wife's rights being enlarged by statute under such circumstances, we have therefore to inquire into the scope of any statute in point. Some of our local acts are construed as affording a substitute for the common-law rule, and not as merely cumulative, and hence require a literal interpretation.[72] In general such legislation is to be considered as grafted upon the common law of coverture which prevailed when this country was settled, and at the Revolution. It contemplates abandonment, and not what might be designed as a merely temporary withdrawal from cohabitation; and it regards the husband in general as completely out of the jurisdiction of the State, never having entered it, or else having forsaken it.[73]

like privilege. *In re* Lancaster, 23 E. L. & Eq. 127; Johnson v. Kirkwood, 4 Dru. & War. 379. And see Wahl v. Braun, 38 E. L. & Eq. 300; Macq. Hus. & Wife, 99, 107, 108; *In re* Rogers, L. R. 1 C. P. 47; McHenry v. Davies, L. R. 10 Eq. 88. A right of action is conferred, too, under 33 & 34 Vict., ch. 93. Moore v. Robinson, 27 W. R. 312.

71. Ayer v. Warren, 47 Me. 217.

72. Hannon v. Madden, 10 Bush, 664.

73. The right is afforded though the wife was abandoned before she arrived in the State, the husband never having been there. Blumenberg v. Adams, 49 Cal. 308. And see Tobin v. Galvin, 49 Cal. 34. The confinement of her husband in an insane asylum in another State may enlarge a wife's right of suit. Gustin v. Carpenter, 51 Vt. 585. A wife who is decreed a *feme sole* trader may convey her real estate by her sole deed. Wilson v. Coursin, 72 Pa. St. 306. See King v. Thompson, 87 Pa. St. 365. Or be sued alone as to her separate estate. Winternitz v. Porter, 86 Pa. St. 35. And see Cocke v. Garrett, 7 Baxt. 360. The absconding of her husband does not charge the wife as a wrong-doer with reference to property left on the premises before she has taken some affirmative action. Campbell v. Quackenbush, 33 Mich.

As for "civil death," we have nothing in the United States which precisely corresponds to the old English sense; abjuration of the realm being altogether obsolete, and banishment or transportation being known in England, but not in the United States.[74] The courts, themselves, upon the suggestion of analogies, have extended the principle which permits wives living apart from their husbands to sue and be sued as *feme sole* in exceptional instances. Thus the husband's transportation for a term of years has been treated in England as a proper case for admitting the wife to this independent condition;[75] also where he becomes an alien enemy;[76] in neither of which instances, it will be observed, is the husband's disability necessarily permanent, but only an absolute one while it lasts. Lord Mansfield extended the exception much further, allowing a wife who lived apart from her husband upon a separate maintenance to contract, sue, and be sued as a *feme sole,* even to the extent of charging her new husband with an unsettled claim thus arising.[77] Lord Kenyon, more technical and inclined to the old order, overturned that rule;[78] and, accordingly, it became re-established that no action at law could be maintained against a married woman unless her husband had abjured the realm.[79] Equity, the doctrine of separate estate, and Married Women's Acts, change once more the direction of the decisions in these later times. Under the English statutes there is a judicial record, so to speak, of the abandonment or desertion; a fair prerequisite not favored, apparently, under the Married Women's Acts of the United States.

287. Sole conveyance, upon privy examination, is provided in some States in cases of abandonment. Leonard v. Mason, 1 Lea, 384. If she lives apart from her husband, her separate property will be charged readily with debts contracted for her own benefit. Johnson v. Cummins, 1 C. E. Green, 97. See, further, Ann Berta Lodge v. Leverton, 42 Tex. 18.

74. 4 Bl. Com. 333.

75. Carroll v. Blencow, 4 Esp. 27.

76. Derry v. Mazarine, 1 Ld. Raym. 147. As to the wife's capacity as a *feme sole* trader by custom, see *supra*, § 296 *et seq.*

77. Barwell v. Brooks, 3 Dougl. 371; Corbett v. Poelnitz, 1 T. R. 5.

78. Marshall v. Rutton, 8 T. R. 545.

79. 2 Kent Com. 161; 2 Bright Hus. & Wife, 71-74.

The deserted wife procures a protection order protecting her earnings and property acquired during such desertion, and permitting her to sue and be sued as in case of a judicial separation.[80]

§ 1327. Crime at Common Law and Under Statutes.

At common law it was not a criminal offence for a husband to leave his wife without means of support,[81] but modern statutes have quite generally provided that such act becomes a criminal offence and is punishable as such.[82]

80. See Nicholson v. Drury Buildings Co., L. R. 7 Ch. D. 48. But similar proceedings obtain in some States. Rooker v. Rooker, 60 Ind. 550; Blake v. Nelson, 29 La. Ann. 245.

81. Grantland v. State, 8 Ala. App. 319, 62 So. 470.

82. State v. Weyant, 149 Ia. 457, 128 N. W. 839 (wife destitute though not starving).

A proceeding under the act approved May 13, 1903 (Laws 1903, p. 155), providing that one who, without cause, abandons and neglects and refuses to provide for his wife is guilty of a misdemeanor and liable to fine and imprisonment, is criminal, notwithstanding the court has power to direct the fine to be paid to the wife. People v. Flury, 173 Ill. App. 640.

Under the act approved May 13, 1903 (Laws 1903, p. 155), making the offence of abandonment coupled with neglect and refusal to provide for the wife punishable criminally, the offence is not a continuing one. *Id.*

Both abandonment and non-support are essential, and mere proof of abandonment will not support conviction under Revisal 1905, § 3355, relating to willful abandonment without providing support. State v. Toney, 162 N. C. 635, 78 S. E. 156.

As used in the title to Laws 1913, ch. 6483, the word "desertion" has a broader meaning that mere physical separation. Welch v. State, 69 Fla. 21, 67 So. 224.

The statute making punishable the abandonment of a wife and minor child by a husband and father does not impose a penalty for temporary separation, but implies a purpose not to support his family, where there is no excuse for his failure to do so. Irving v. State (Tex. Cr. App.), 166 S. W. 1166.

A husband, who maintained his wife at the home of his father, and who induced her to leave there under the pretext of making a visit to her father, and who then clandestinely deserted her at a nearby town, leaving her without money and without a home and without providing for her future support, was guilty of wife abandonment. State v. Williams, 136 Mo. App. 304, 116 S. W. 1128; People v. Elbert, — Ill. —, 122 N. E. 816; State v. Lyons, — Mo. App. —, 207, S. W. 264 (state the complaint); *Ex parte* Turner, — Vt.

Though a married man forsakes his family, he is not absolved from the legal and moral obligation of supporting them. To the end, chiefly, that the deserted wife and children may not become a burden to the public, many States now subject the husband to a criminal prosecution for his neglect of marital duty. By giving bond, with proper surety, to furnish the needful support, such unfaithful spouse goes clear,[83] the punishment seldom extending to the simple abandonment.[84]

§ 1328. Constitutionality and Effect of Statutes.

Statutes making the abandonment of the wife a criminal offence have been universally upheld as being within the constitutional power of the legislature,[85] and being criminal in nature must be

—, 102 A. 943; Williams v. Farmers' Nat. Bank of Stephenville, — Tex. Civ. App. —, 201 S. W. 1083 (sentence of husband to penitentiary is equivalent to abandonment); People v. Keyser, 196 Ill. App. 617.

83. Commonwealth v. Jones, 90 Pa. St. 431.

84. Under the New York act a husband cannot be convicted upon mere proof of abandonment; it must further be shown that the deserted wife has no adequate means of support, and is a burden on the public. People v. Walsh, 18 N. Y. Supr. 292.

85. Cr. Code 1912, § 697, making the abandonment of a wife and failure to support her without just cause a misdemeanor punishable by imprisonment, held constitutional. State v. English, 101 S. C. 304, 85 S. E. 721, L. R. A. 1915F, 977; People v. Bos, 162 Ill. App. 454; Brand v. Brand, 252 Ill. 134, 96 N. E. 918; Green v. State, 96 Ark. 175, 131 S. W. 463.

Act May 13, 1903 (Laws 1903, p. 155), denouncing the crime of wife abandonment and providing that fines may be directed to be paid to the wife, or that the court may direct defendant to pay a weekly sum to the wife for one year, is not invalid. People v. Heise, 257 Ill. 443, 100 N. E. 1000.

Laws 1911, ch. 163, making it an offence for a husband to desert and omit to support his wife or children, is not unconstitutional in so far as it provides (section 4) for orders for periodical payments for the wife's benefit, or (section 7) relates to wages of one confined at hard labor. State v. Gillmore, 98 Kan. 835, 129 P. 1123.

Code Supp. 1907, § 4775a, providing that whoever shall without good cause willfully neglect to maintain or provide for his wife, she being in a destitute condition, or shall neglect and refuse to provide for his children, they being in a destitute condition, is as definite in setting forth the offence as in the nature of things seem possible, and the statute is not

strictly construed,[86] and are not retroactive, but both the abandonment and the failure to support must have occurred since the taking effect of the statute.[87]

The statutes apply only where the offence was committed within the State,[88] and it must appear that the husband knew that his wife was in the State.[89]

§ 1329. Elements of Offence.

It is usually provided that such abandonment be wilful[90] and

void for uncertainty. State v. Dvoracek, 140 Ia. 266, 118 N. W. 399.

Greater New York Charter (Laws 1901, ch. 466), § 687, requiring a husband who has abandoned his family to give bonds for their support, as amended by Laws 1908, ch. 357, construed to make such bonds absolute obligations, and not mere contracts of indemnity, is not unconstitutional. Drummond v. McGarry, 130 N. Y. S. 160, 72 Misc. 341; State v. Cucullu, 110 La. 1087, 35 So. 300; State *ex rel* Mioton v. Baker, 112 La. 801, 36 So. 703; State v. Latham, 136 Tenn. 30, 188 S. W. 534.

86. Virtue v. People, 122 Ill. App. 223; People v. Brown, 192 Ill. App. 483; *contra*, State v. Waller, 90 Kan. 829, 136 P. 215 (liberally construed as a remedial statute). See Campbell v. People, 42 Colo. 228, 94 P. 256 (as to repeal of earlier statute). See Keller v. Commonwealth, 71 Pa. 413 (as to repeal).

87. State v. Hoon, 78 Neb. 618, 111 N. W. 462; Thacker v. State, 62 Tex. Cr. App. 294, 136 S. W. 1095 (although seduction took place before the law took effect); People v. Glabman, 197 Ill. App. 508.

88. A husband who left his wife in New York and came to Illinois cannot be prosecuted under the act approved May 13, 1903 (Laws 1903, p. 155), making abandonment and failure to provide for the wife or children, without cause, punishable criminally, since the offence was committed in New York, and not in this State. People v. Flury, 173 Ill. App. 640; People v. Herrick, 200 Ill. App. 428 (not where husband a resident of another State); Fisher v. Sommerville (W. Va.), 98 S. E. 67.

89. People v. Smith, 31 Cal. App. 736, 161 P. 753.

90. In order to constitute wife abandonment, a husband's desertion must be wilful, without the wife's consent, and it must also appear that he has failed to provide adequate support for her. State v. Smith, 164 N. C. 475, 79 S. E. 979; State v. Dvoracek, 140 Ia. 266, 118 N. W. 399; State v. Burton (Mo. App.), 178 S. W. 219; Baskins v. State (Tex. Cr. App.), 171 S. W. 723; Furlow v. State (Tex. Cr. App.), 182 S. W. 308 (ignorance of husband of her destitution as a defence); People v. Stickle, 16 Det. Leg. N. 204, 156 Mich. 557, 121 N. W. 497.

"Just cause" as used in Act No.

physical rather than constructive abandonment,[91] and include neglect to provide;[92] that the husband is able to support her;[93] that the wife is left destitute;[94] and it is in some States an element of the offence that the wife is left so that she is likely to be a public charge,[95] or that the abandonment take place after seduction and

34 of 1902, providing for the punishment of "any person who shall, without just cause, desert, or wilfully neglect to provide for the support of his wife, or minor children," means "lawful ground." State v. Donzi, 133 La. 925, 63 So. 405.

Under Rev. St. 1909, § 4495, as amended by Laws 1911, p. 193, to constitute the offence of abandonment, there must be both abandonment and failure to support, which abandonment must be without good cause and with criminal intent. State v. Burton, 171 Mo. App. 345, 157 S. W. 831; State v. Frederici (Mo. App.), 184 S. W. 170; Dickey v. State (Tex. Cr. App.), 198 S. W. 309; State v. Macklin, 86 Mo. App. 636.

91. Milbourne v. State, 161 Ind. 364, 68 N. E. 684.

92. State v. Conway (Ia.), 166 N. W. 596; State v. Stout, 139 Ia. 557, 117 N. W. 958; State v. Lasley, 167 Mo. App. 464, 151 S. W. 752; State v. McPherson, 72 Wash. 371, 130 P. 481; People v. Meara, 140 N. Y. S. 575, 79 Misc. 57; State v. Toney, 162 N. C. 635, 78 S. E. 156; State v. Burton (Mo. App.), 178 S. W. 219; Dempsey v. State, 108 Ark. 76, 157 S. W. 734 (complete failure to provide is not necessary); State v. Stone (S. C.), 98 S. E. 333; State v. Frederici (Mo. App.), 184 S. W. 170 (no criminal abandonment while wife is living on proceeds of husband's property).

93. Goodard v. State, 73 Neb. 739, 103 N. W. 443; Havlicek v. State 101 Neb. 782, 165 N. W. 251; Grantland v. State, 8 Ala. App. 319, 62 So. 470; People v. Turner, 29 Cal. App. 193, 156 P. 381, 382 (must show ability); State v. Burton (Mo.), 183 S. W. 315, affg. judg. (App.), 178 S. W. 219; Moore v. State (Tex. Cr. App.), 180 S. W. 1100; Brandel v. State, 161 Wis. 532, 154 N. W. 997; State v. Wiese, 156 Mo. App. 135, 136 S. W. 238; People v. Schelske (Mich.), 153 N. W. 781; State v. Riesenmy (Mo. App.), 203 S. W. 472; *contra*, People v. Stickle, 16 Det. Leg. N. 204, 121 N. W. 497, 156 Mich. 557.

94. Wallace v. State (Tex. Cr. App.), 210 S. W. 206; People v. Selby, 26 Cal. App. 796, 148 P. 807; State v. Gillmore, 88 Kan. 835, 129 P. 1123; State v. Fuller, 142 Ia. 598, 121 N. W. 3; State v. Lyons (Mo. App.), 207 S. W. 264 (crime may be complete on day of abandonment if wife left in destitution); State v. Rice, 106 Ind. 139, 5 N. E. 906; Foster v. People, 101 Ill. App. 84; *contra*, People v. Glabman, 197 Ill. App. 508.

95. Eckerson v. Mitchell, 74 N. J. Law, 347, 68 A. 81; People v. Smith, 124 N. Y. S. 57, 139 App. Div. 361; People v. De Wolf, 118 N. Y. S. 75, 133 App. Div. 879; People v. Boettcher, 126 N. Y. S. 301, 141 App. Div. 531; People v. Duffin, 125 N. Y. S. 71, 68 Misc. 290; People v. Palminteri, 103 N. Y. S. 1068, 119 App. Div.

prosecution for seduction and marriage,[96] and a valid marriage must be shown.[97]

§ 1330. Defences.

The crime of abandonment is not committed where the separation is caused by the fault of the wife of such character as to permit him to obtain a divorce,[98] but the unchastity of the wife before the marriage is no defence,[99] and it is no defence that both parties are guilty so that neither can obtain a divorce;[1] or where she leaves him pending his suit for divorce,[2] as where the wife refuses to go to the home he provides,[3] but is committed where the wife is forced by the husband's conduct to leave him,[4] but the misconduct of the

82; People v. Paaschen, 174 N. Y. S. 406; People v. Dershem, 79 N. Y. S. 612, 78 App. Div. 626; People v. Miller, 63 N. Y. S. 949, 30 Misc. 355, 14 N. Y. Cr. R. 407.

96. Coleman v. State (Tex. Cr. App.), 179 S. W. 1172; Moore v. State (Tex. Cr. App.), 180 S. W. 1100; Baskins v. State (Tex. Cr. App.), 171 S. W. 723; Thacker v. State, 62 Tex. Cr. App. 294, 136 S. W. 1095; Furr v. State (Tex. Cr. App.), 194 S. W. 395; People v. Ellis, 204 Mich. 157, 169 N. W. 930.

97. People v. Schmutz, 198 Ill. App. 108; People v. Steere, 184 Mich. 556, 151 N. W. 617.

98. State v. Macklin, 86 Mo. App. 636 (indignities); People v. Bliskey, 12 N. Y. Cr. R. 472, 47 N. Y. S. 974, 21 Misc. 433; State v. Hopkins, 130 N. C. 647, 40 S. E. 973; State v. Hill, 161 Ia. 279, 142 N. W. 231; People v. Demos, 100 N. Y. S. 968, 115 App. Div. 410; State v. Stout, 139 Ia. 557, 117 N. W. 958. See State v. Staffens, 16 Mo. App. 553; James v. State (Tex. Cr. App.), 167 S. W. 727; Kilpatrick v. People (Colo.), 170 P. 956; State v. Conway (Ia.), 166 N. W. 596; State v. Widner (Mo. App.), 184 S. W. 909; *contra*, State v. Tierney, 1 Pennewill, 116, 39 A. 774.

99. State v. Maher, 77 Mo. App. 401.

1. People v. Schrady, 58 N. Y. S. 143, 40 App. Div. 460, 14 N. Y. Cr. R. 149, 53 N. Y. S. 964, 24 Misc. 532, 13 N. Y. Cr. R. 331.

2. Doyle v. Doyle, 26 Mo. 545.

3. Grantland v. State, 8 Ala. App. 319, 62 So. 470; People v. Flewellyn, 111 N. Y. S. 621; People v. Dershem, 79 N. Y. S. 612, 78 App. Div. 626; Green v. State (Tex. Cr. App.), 206 S. W. 93.

4. Taylor v. Taylor, 108 Md. 129, 69 A. 632; State v. Dvoracek, 140 Ia. 266, 118 N. W. 399.

The test is whether a third person would be entitled to recover against the husband for necessaries furnished the wife. People v. Kellogg (Mich.), 171 N. W. 410. See People v. Neyer, 79 N. Y. S. 367 (infidelity of husband is not abandonment).

wife after abandonment is no defence.[5] The crime is committed although the husband and wife live separately by consent where he refuses to provide for her.[6]

It may not be abandonment where the parties separate by mutual consent,[7] although the wife's sincere offer to return may constitute his refusal an abandonment.[8]

Where the husband treats the wife so cruelly that she leaves him, this is not a constructive abandonment of her by him to render him guilty of abandonment.[9]

It is no defence that the marriage was procured through the fraud of the wife,[10] or that the marriage was made under duress by the wife, where no attempt to annul the marriage has been made.[11]

It is usually no defence to the charge that the wife is after abandonment supported by others,[12] or that the wife's parents would, if called upon, support her;[13] that a wife after abandonment supported herself.[14] An offer to return and live with the wife is not a defence to a charge of abandonment,[15] and a husband's offer to provide a home not made in good faith is not a defence,[16] or that the wife refused after abandonment to take the husband

5. Gobel v. State, 15 Ala. App. 178, 72 So. 756, 73 So. 1000.

6. Spencer v. State, 132 Wis. 509, 112 N. W. 462; People v. Romaine, 109 N. Y. S. 1100, 57 Misc. 571; Kingsbury v. Sternberg, 165 N. Y. S. 493, 178 App. Div. 435; Virtue v. People, 122 Ill. App. 223.

7. State v. Macklin, 86 Mo. App. 636.

8. State v. Vreeland (N. J. Sup.), 99 A. 57.

9. State v. Kretzkamp, 87 N. J. Law, 80, 93 A. 697.

10. Commonwealth v. Shaman, 223 Mass. 62, 111 N. E. 720; Carnley v. State, 162 Ala. 94, 50 So. 362.

11. Bostick v. State, 1 Ala. App. 255, 55 So. 260.

12. Grantland v. State, 8 Ala. App. 319, 62 So. 470; State v. Waller, 90 Kan. 829, 136 P. 215; State v. Baurens, 117 La. 136, 41 So. 442.

13. Miller v. State, 123 Ark. 480, 185 S. W. 789; Pippins v. State, 79 Tex. Cr. App. 525, 187 S. W. 213.

14. Draper v. Commonwealth, 115 Va. 941, 79 S. E. 322.

15. Virtue v. People, 122 Ill. App. 223.

16. State v. Smith, 164 N. C. 475, 79 S. E. 979; People v. Paaschen, 174 N. Y. S. 406.

back again.[17] That the wife has released the husband from further support is no defence to a charge of abandonment,[18] or that she was not dependent on him for support.[19]

It is not a defence that the wife was a prostitute before marriage,[20] or that the wife might have brought suit for divorce.[21]

The fact that the husband has already been convicted of abandonment is no defence where the husband resumes conjugal relations and then abandons the wife again,[22] and it is no defence that the husband left the wife to work for his father.[23]

§ 1331. Effect of Divorce.

A decree of divorce gives the husband immunity from prosecution for abandonment,[24] but a decree *nisi* is no defence,[25] and prosecution for the abandonment of one's wife cannot be defended on the plea that the husband's suit for divorce is pending.[26] A divorce obtained by the wife after desertion is no defence,[27] and a judgment for alimony may not be a defence to a prosecution for abandonment.[28]

It is no abandonment where the husband is living apart from the wife pursuant to a judgment in separation.[29]

17. State v. Wiese, 156 Mo. App. 135, 136 S. W. 238.

18. State v. Karagavoorian, 32 R. I. 477, 79 A. 1111.

19. State v. English, 101 S. C. 304, 85 S. E. 721, L. R. A. 1915F, 977.

20. People v. McDonald, 178 Ill. App. 159.

21. People v. Romaine, 109 N. Y. S. 1100, 57 Misc. 571.

22. State v. Vollenweider, 94 Mo. App. 158, 67 S. W. 942.

23. People v. Malsch, 119 Mich. 112, 77 N. W. 638, 5 Det. Leg. N. 709, 75 Am. St. R. 381.

24. Lacey v. Lacey (Mich.), 155 N. W. 489.

25. Kingsbury v. Sternberg, 165 N. Y. S. 493, 178 App. Div. 435.

26. State v. Gunzler, 52 Mo. 172; Howland v. Howland, 20 Hun, 472; Sherrid v. Southwick, 43 Mich. 515.

27. State v. Lannoy, 30 Ind App. 335, 65 N. E. 1052.

28. King v. State, 12 Ga. App. 482, 77 S. E. 651.

29. People v. Cullen, 153 N. Y. 629, 47 N. E. 894, 44 L. R. A. 420.

CHAPTER IV.

ALIENATION OF AFFECTIONS.

SECTION 1332. Wife's Right of Action.
1333. Right of One Spouse to the Other's Society; Suit for Enticement.
1334. Proximate Cause.
1335. Malice; Negligence; Interference by Relatives.
1336. Defences.
1337. Effect of Divorce.
1338. Sale of Drugs to Spouse.
1339. Damages.

§ 1332. Wife's Right of Action.

At common law a suit for a tort to the wife could not be brought by her alone on account of unity of husband and wife, but under a statute providing that a married woman may sue or be sued he need not be joined in an action by her against a third person for alienation of his affections. The court holds this to be a property right included in the statute. The old rule arose from the theory that the inferior had no property in the company of the superior, but the old rules of the common law, laid down centuries gone, making the wife the inferior, practically a slave, have become wholly distasteful to enlightened public sentiment and have "gone glimmering through the dream of things that were, the school boy's tale, the wonder of an hour." [30] So to-day the wife is universally allowed this right of action under modern statutes,[31] and

30. Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; Gross v. Gross, 70 W. Va. 317, 73 S. E. 961, 39 L. R. A. (N. S.) 261; Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N. E. 102, 40 L. R. A. (N. S.) 360. See Van Arnam v. Ayers, 67 Barb. 544; Breman v. Paasch, 7 Abb. (N. Y.) N. Cas. 249.

31. Humphrey v. Pope, 122 Cal. 253, 54 P. 847; Cooper v. Cooper, 102 Kan. 378, 171 P. 5; Noxon v. Remington, 78 Conn. 296, 61 A. 963; Betser v. Betser, 186 Ill. 537, 58 N. E. 249, 52 L. R. A. 630, 78 Am. St. R. 303; Holmes v. Holmes, 133 Ind. 386, 32 N. E. 932; Jonas v. Hirshburg, 18 Ind. App. 581, 48 N. E. 656;

desertion of the wife by the husband may be a necessary element of her action.[32] Under married women's statutes permitting her to recover for damages to her person or character or property, a married woman may recover in an action in her own name for the alienation of the affections of her husband.[33] The absurdity and cruel injustice of the common-law fiction of the identity of husband and wife have long been recognized, and the tendency of all modern legislation has been towards the emancipation of the wife. Our statutes clearly manifest the purpose to give her an action to enforce any legal right she may have or to secure redress for any actionable wrong inflicted upon her where the recovery would inure to her benefit.

The wife has a right to an action for the alienation of her husband's affections even though he does not literally abandon her,

Gregg v. Gregg, 37 Ind. App. 210, 75 N. E. 674; Betser v. Betser, 186 Ill. 537, 58 N. E. 249, 52 L. R. A. 630, 78 Am. St. R. 303; Surbeck v. Surbec 78 Am. St. R. 303; Surbeck v. Surbeck, — Mo. App. —, 208 S. W. 645; Moelleur v. Moelleur, — Mont. —, 173 P. 419; Turner v. Heavrin, — Ky. —, 206 S. W. 23; Sims v. Sims, 79 N. J. Law, 577, 76 A. 1063; Nevins v. Nevins, 68 Kan. 410, 75 P. 492; Burch v. Goodson, 85 Kan. 86, 116 P. 216; Dodge v. Rush, 28 App. D. C. 149; Smith v. Gillapp, 123 Ill. App. 121; Keen v. Keen, 49 Ore. 362, 90 P. 147, 10 L. R. A. (N. S.) 504; Work v. Campbell, 164 Cal. 343, 128 P. 943; Nieberg v. Cohen, 88 Vt. 281, 92 A. 214, L. R. A. 1915C, 483; White v. White, 76 Kan. 82, 90 P. 1087 (although plaintiff had a bad reputation); Fronk v. Fronk, 159 Mo. App. 543, 141 S. W. 692. See Eliason v. Draper, 77 A. 572; Weber v. Weber, 169 S. W. 318; Golden v. Gartleman, 159 Ill. App. 338; Claxton v. Pool, 182 Mo. App. 13, 167 S. W. 623; Heisler v. Heisler, — Ia. —, 127 N. W. 823; Workman v. Workman, 43 Ind. App. 382, 85 N. E. 997; Powers v. Sumbler, 83 Kan. 1, 110 P. 97; Farneman v. Farneman, 90 N. E. 775, rehearing denied, 46 Ind. App. 453, 91 N. E. 968; Messervy v. Messervy, 82 S. C. 559, 64 S. E. 753; Lupton v. Underwood, — Del. Super. —, 85 A. 965; Miller v. Pearce, 85 A. 620, 43 L. R. A. (N. S.) 332 (defendant liable, although seduced); Hall v. Smith, 140 N. Y. S. 796, 80 Misc. 85; Cripe v. Cripe, 170 Cal. 91, 148 P. 520; Gross v. Gross, 70 W. Va. 317, 73 S. E. 961. See *contra*, Crocker v. Crocker, 98 F. 702.

32. Condoni v. Donati, 6 Cal. App. 83, 91 P. 423; *contra*, Rott v. Goehring, 33 N. D. 413, 157 N. W. 294 (woman may sue though husband has not actually abandoned her).

33. Weber v. Weber, — Ark. —, 169 S. W. 318, L. R. A. 1915A, 67; Sims v. Sims, 79 N. J. L. 577, 76

but is still living with her. Consortium means something more than mere physical presence in the home, and nothing could give the sensitive wife more anguish than the presence of a husband who is untrue to his marriage vows. The action is also not barred by the fact that the husband is more to be blamed than the defendant, or that the husband was estranged from the wife prior to the illicit relations with the defendant.[34] In an action by a woman for the alienation of her husband's affections evidence tending to show conduct on his part with other women than the defendant during this period such as to indicate little affection for the plaintiff is properly introduced in mitigation of damages.[35]

§ 1333. Right of One Spouse to the Other's Society; Suit for Enticement.

Each spouse is entitled to the society and companionship of the other. Inasmuch as the husband is thus entitled, he may recover his wife from any person who would withhold or withdraw her from him. This is a well-understood principle the world over.[36] And the common law gives him the right to sue for damages all persons who seek to entice her away.[37]

The gist of the action is the loss of consortium,[38] and it is not necessary to show sexual intercourse with the wife,[39] and the plain-

A. 1063, 29 L. R. A. (N. S.) 842; *contra,* Sims v. Sims, 77 N. J. Law, 251, 72 A. 424.

34. Foot v. Card, 58 Conn. 1, 18 A. 1027, 6 L. R. A. 829; Rott v. Goehring, 33 N. D. 413, 157 N. W. 294, L. R. A. 1916E, 1086.

35. Phillips v. Thomas, 70 Wash. 533, 127 Pa. 97, 42 L. R. A. (N. S.) 582.

36. 1 Fras. Dom. Rel. 240, 241.

37. 1 Chitty Plead. 91; Hutcheson v. Peck, 5 Johns. 196; Friend v. Thompson, Wright, 636; Rabe v. Hanna, 5 Ham. 530; Bennett v. Smith, 21 Barb. 439; Barnes v. Allen, 30 Barb. 663.

38. Dodge v. Rush, 28 App. D. C. 149; Farneman v. Farneman, 46 Ind. App. 453, 90 N. E. 775, 91 N. E. 968; Lupton v. Underwood, 3 Boyce, 519, 85 A. 965; McGregor v. McGregor (Ky. 1909), 115 S. W. 802; Jenness v. Simpson, 84 Vt. 127, 78 A. 886.

39. Ireland v. Ward, 51 Ore. 102, 93 P. 932; Keath v. Shiffer, 37 Pa. Super. Ct. 573; Roberts v. Jacobs, 37 S. D. 27, 156 N. W. 589; Callis v. Merrieweather, 98 Md. 361, 57 A. 201, 103 Am. St. R. 404.

tiff must always prove a valid marriage.[40] Action for alienation may be brought although a ceremonial marriage was not physically consummated.[41]

The rights of the husband to sue for interference with his marital rights are not destroyed by the Married Women's Acts enlarging the property rights of married women,[42] and the action is usually against the paramour alone,[43] the other spouse not being a necessary or proper party.[44]

§ 1334. Proximate Cause.

As in other tort actions, it is necessary to prove that the defendant was the proximate and moving cause of the injury,[45] but it need not appear that the defendant was the sole cause of the separation.[46]

The mere fact that the plaintiff's wife maintained improper

42. Butterfield v. Ennis, 193 Mo. App. 638, 186 S. W. 1173 (common-law marriage enough); Coy v. Humphreys, 142 Mo. App. 92, 125 S. W. 877.

41. Cochran v. Cochran, 111 N. Y. S. 588, 127 App. Div. 319.

42. Brame v. Clark, 148 N. C. 364, 62 S. E. 418.

43. Nieberg v. Cohen, 88 Vt. 281, 92 A. 214, L. R. A. 1915C, 483.

44. Messervy v. Messervy, 82 S. C. 559, 64 S. E. 753; White v. White, 140 Wis. 538, 122 N. W. 1051; Eliason v. Draper (Del. Super. 1910), 77 A. 572; Work v. Campbell, 164 Cal. 343, 128 P. 943.

45. Cripe v. Cripe, 170 Cal. 91, 148 P. 520; Codoni v. Donati, 6 Cal. App. 83, 91 P. 423; Moelleur v. Moelleur, — Mont. —, 173 P. 419 (no right of action where spouse voluntarily makes love to defendant without inducement by her); Eklund v. Hackett, — Wash. —, 179 P. 803 (regardless of defendant's intention); Powers v. Sumbler, 83 Kan. 1, 110 P. 97; Scott v. O'Brien, 129 Ky. 1, 110 S. W. 260, 33 Ky. Law Rep. 450; Bergeman v. Solomon, 143 Ky. 581, 136 S. W. 1010.

Controlling Cause.— It was not necessary, to confer a right of action for alienation of affections, that defendant's conduct be the sole cause of the alienation or separation; it being sufficient if it was the controlling cause. Baird v. Carle, 157 Wis. 565, 147 N. W. 834; Lupton v. Underwood, — Del. Super. —, 85 A. 965; Sullivan v. Valiquette, — Colo. —, 180 P. 91; Linden v. McClintock, — Mo. App. —, 187 S. W. 82 (the plaintiff need not show the defendant is the sole cause of the alienation).

46. Nevins v. Nevins, 68 Kan. 410, 75 P. 492.

relations with the defendant is not enough to show alienation, but some active interference by the defendant must be shown.[47]

Where in an action for alienation the plaintiff claims that the husband left her on account of the language of the defendant, it is competent for the defendant to show in rebuttal statements the husband made just before he left to the effect that he was going on account of the plaintiff's infidelity as showing his intention. The husband cannot testify to conversations with his wife in which the plaintiff admitted her guilt, as this would be admitting conversations between husband and wife.[48]

It must appear, where there are two defendants, that they both co-operated to cause the alienation,[49] and merely harboring the wife after abandonment will not constitute the alienation.[50]

§ 1335. Malice; Negligence; Interference by Relatives.

In an action for alienation of affections, where there is no element of seduction, the plaintiff must show malice to recover. Mere advice by the defendant given with an honest desire to assist is not enough,[51] but the motives of the defendant are not important.[52] It is well settled that either husband or wife, in order to recover damages from a third party for alienating the affections of the other, must show that such third party took an active and intentional part in causing the estrangement. Liability is imposed

47. Hanor v. Housel, 113 N. Y. S. 163, 128 App. Div. 801; De Ford v. Johnson, 152 Mo. App. 209, 133 S. W. 393.

48. Ickes v. Ickes, 237 Pa. 582, 85 A. 885, 44 L. R. A. (N. S.) 1118.

49. Heisler v. Heisler (Ia. 1910), 127 N. W. 823; Pooley v. Dutton, — Ia. —, 147 N. W. 154.

50. Powell v. Benthall, 136 N. C. 145, 48 S. E. 598.

51. Geromini v. Brunelle, 214 Mass. 492, 102 N. E. 67, 46 L. R. A. (N. S.) 465; Zimmerman v. Whiteley, 134 Mich. 39, 95 N. W. 989, 10 Det. Leg. N. 383; Hostetter v. Green, 150 Ky. 551, 150 S. W. 652; Boland v. Stanley, 88 Ark. 562, 115 S. W. 163; Geromini v. Brunelli, 214 Mass. 492, 102 N. E. 67, 46 L. R. A. (N. S.) 465; Ellsworth v. Shimer, 128 N. Y. S 883.

Malice in a legal sense means a wrongful act done intentionally without just cause. Zimmerman v. Whiteley, 134 Mich. 39, 95 N. W. 989, 10 Det. Leg. N. 383.

52. Hartpence v. Rodgers, 143 Mo. 623, 45 S. W. 650.

upon an intermeddler where he purposely and unjustifiably induces either husband or wife to abandon the other, but is not imposed upon him unless, by acts knowingly and intentionally committed for that purpose, he was the procuring cause of the separation. It is not enough to allege negligence. Therefore no recovery can be had against a detective company on the ground that the husband hired them to shadow his wife and that they negligently shadowed another woman and reported her immoral, thus causing the husband to falsely charge his wife with immorality, whereupon she left him and would not return.[53]

In actions for enticement, malice and improper motive are always to be considered; and parents and near relatives stand on a different footing from strangers. So is the previous conduct of the husband towards his wife a material element to be considered; since this, and not the interference of others, may have occasioned the separation. It is one thing to actively promote domestic discord, but quite another to harbor from motives of kindness and humanity one who seeks shelter from the oppression of her own lawful protector.

Yet such conduct, whatever the motives, is, on the part of strangers, exceedingly perilous, generally open to misconstruction, and never to be encouraged. They should leave the parties to their lawful remedies against one another. With parents it is different. There are several cases in the American reports where a father is not only held to be absolved from liability for sheltering his daughter, who has fled from a drunken and profligate husband, but even stimulated to do so. "A father's house," says Chancellor Kent, "is always open to his children; and whether they be married or unmarried, it is still to them a refuge from evil and a consolation in distress. Natural affection establishes and consecrates this asylum," [54] and parents of a son have the same right to advise

53. Lilligren v. Burns International Detective Agency, 135 Minn. 60, 160 N. W. 203, L. R. A. 1917B, 679.

54. Hutcheson v. Peck, 5 Johns. 196. See also Friend v. Thompson, Wright, 636; Bennett v. Smith,

him in good faith in regard to leaving his wife.[55] In a declaration in an action by a wife against her father-in-law for alienation of affections it is enough to charge malice without also alleging that the defendant's act was not actuated by parental solicitude for the welfare of the son. The plaintiff in such a case carries the burden of proof to overcome the presumption that the parent acted under the influence of natural affection and for what he believed to be for the good of the child.[56] In an action for alienation against the father of the spouse the measure of proof is greater than it would have been had he been a mere intermeddling stranger.[57] But this does not justify even a parent in hostile interference against the husband;[58] for the latter's rights are still superior: and the father must give up his daughter, and the marriage-offspring, whenever she wishes to return, unless the proper tribunal has decreed otherwise; though he might, we suppose, by fair arguments, urged to promote her true good, seek to dissuade her from returning. The legal doctrine seems to be this, that honest motives may shield a parent from the consequences of indis-

21 Barb. 439; Smith v. Lyke, 20 N. Y. Supr. 204; Multer v. Knibbs, 193 Mass. 556, 79 N. E. 762; Boland v. Stanley, 88 Ark. 562, 115 S. W. 163; Ratcliffe v. Walker, — Va. —, 85 S. E. 575; Ray v. Parsons, — Ind. —, 109 N. E. 202; Miller v. Miller, 154 Ia. 344, 134 N. W. 1058; Kleist v. Breitung, 232 F. 555, 146 C. C. A. 513; Beisel v. Gerlach, 221 Pa. 232, 70 A. 721, 18 L. R. A. (N. S.) 516; Heisler v. Heisler, 151 Ia. 503, 131 N. W. 676; Francis v. Outlaw, 127 Md. 315, 96 A. 517; Workman v. Workman, 43 Ind. App. 382, 85 N. E. 997; Pooley v. Dutton, — Ia. —, 147 N. W. 154; Jones v. Monson, 137 Wis. 478, 119 N. W. 179.

55. Heisler v. Heisler (Ia. 1910), 127 N. W. 823; Heisler v. Heisler, 151 Ia. 503, 131 N. W. 676; Fronk v. Fronk, 159 Mo. App. 543, 141 S. W. 692; Melcher v. Melcher, 102 Neb. 790, 169 N. W. 720; Cooper v. Cooper, 102 Kan. 378, 171 P. 5.

56. Gross v. Gross, 70 W. Va. 317, 73 S. E. 961, 39 L. R. A. (N. S.) 261; Luick v. Arends, 21 N. D. 614, 132 N. W. 353; Miller v. Miller, 154 Ia. 344, 134 N. W. 1058; Gross v. Gross, 70 W. Va. 317, 73 S. E. 961.

57. Ickes v. Ickes, 237 Pa. 582, 85 A. 885, 44 L. R. A. (N. S.) 118; Cripe v. Cripe, 170 Cal. 91, 148 P. 520.

58. Briles v. Briles, — Ind. App. —, 112 N. E. 449; Allen v. Forsythe, 160 Mo. App. 262, 142 S. W. 820; Klein v. Klein, 31 Ky. Law Rep. 28, 101 S. W. 382.

cretion, while adding nothing to the right of actual control; the intent with which the parent acted being the material point, rather than the justice of the interference; that a husband forfeits his right to sue others for enticement, where his own misconduct justified and actually caused the separation; but that otherwise his remedy is complete against all persons whomsoever who have lent their countenance to any scheme for breaking up his household.

A curious case of this sort came before the Supreme Court of North Carolina in 1849. The defendant had enticed away the wife of the plaintiff. The two afterwards entered into an agreement that the defendant should keep the plaintiff's wife and child at his own home, and should raise, educate, and provide for the child by appropriating the portion of property formerly intended for the mother's provision; that he should not be liable for having enticed the wife away; and that the plaintiff might visit his wife and child not exceeding four or five days at a time. The wife was not made a party to the contract, though it appeared to have been made with her approval. The plaintiff afterwards rescinded the agreement, demanded his wife, and, upon refusal of the defendant to give her up, sued him in damages. The court sustained him; pronouncing the contract to be "neither in form or substance a contract for a separation, but simply a license to harbor the wife and child, securing the defendant against any legal responsibility for so doing until withdrawn." And it was further intimated that such a contract was absolutely void as against public policy.[59]

The parents of a husband are in the same way liable to the wife if they induce him to leave her.[60]

§ 1336. Defences.

It is no defence that the injured spouse knew of the impropriе-

59. Barbee v. Armstead, 10 Ired. 530. See also 1 Burge Col. & For. Laws, 238, for a like doctrine at the civil law.

60. Cochran v. Cochran, 111 N. Y. S. 588, 127 App. Div. 319; Lannigan v. Lannigan, 222 Mass. 198, 110 N. E. 285.

ties going on unless he connived at them,[61] but the consent of the injured spouse to the acts complained of is a bar to recovery.[62]

It is a good defence to an action for alienation to show that the act of the spouse was voluntary and not due to any wrongful or intentional act of the defendant.[63]

The consent of the wife to adultery is no defence to an action by the husband for alienation,[64] and it is no defence that there was an estrangement between the parties before the defendant appeared,[65] but the spouse cannot recover who has himself brought about the loss of affection by his conduct.[66] It is no defence that the plaintiff suffered no pecuniary loss.[67]

§ 1337. Effect of Divorce.

A husband may recover for alienation of a wife's affections even though she has been previously awarded a divorce against him, and even though his application for divorce on the ground of abandonment was denied and hers was granted. Abandonment of a wife by a husband does not necessarily mean that her affections have not theretofore been alienated from him by other persons. The issue of abandonment in a divorce suit and the issue of alienation of affections between either of them and a third party in another and distinct case are in no sense akin to each other; and because the evidence in the two cases may be substantially the same is no

61. Woldson v. Larson, 164 F. 548.

62. Milewski v. Kurtz (N. J. Sup. 1908), 71 A. 107; McAlpin v. Baird, — S. D. —, 166 N. W. 639.

63. Scott v. O'Brien, 129 Ky. 1, 110 S. W. 260, 33 Ky. Law Rep. 450.

64. Powell v. Strickland, 163 N. C. 393, 79 S. E. 872.

65. Philpott v. Kirkpatrick, 171 Mich. 495, 137 N. W. 232; Lupton v. Underwood, — Del. Super. —, 85 A. 965; Miller v. Pearce, — Vt. —, 85 A. 620, 43 L. R. A. (N. S.) 332; Bailey v. Kennedy, 148 Ia. 715, 126 N. W. 181; De Ford v. Johnson, 152 Mo. App. 209, 133 S. W. 393; Rott v. Goehring, 33 N. D. 413, 157 N. W. 294; Moelleur v. Moelleur, — Mont. —, 173 P. 419; *contra*, Hall v. Smith, 140 N. Y. S. 796, 80 Misc. 85.

66. Slaton v. Milburn, 180 Ky. 655, 203 S. W. 829.

67. Prettyman v. Williamson, 1 Pennewill, 224, 39 A. 731.

reason why a judgment in one should be a bar to the other.[68] A statute providing that in all cases of divorce the guilty party shall forfeit all rights and claims under and by virtue of the marriage does not foreclose the husband against whom a divorce is granted from maintaining action against a third party for alienation of the wife's affections before the divorce was granted. The "rights and claims" referred to in the statute are rights and claims between husband and wife which spring up by reason of the marriage, and the statute has no reference whatever to the tortious act of a third party during the existence of the marriage relation.[69]

Apart from the statute it is clear that a judgment for divorce, even at the husband's fault, is not a bar to an action of this kind. It is not strange that after discovering such acts of alienation the husband should permit the wife to obtain a divorce. It would be against public policy to permit the seducer of a wife to set up a disagreement or even a separation, between her and her husband, as a complete defence to an action by the latter for the wrong.[70]

A divorce obtained by the wronged spouse is no defence to his action against a third party who alienated the affections of the spouse,[71] and even a divorce obtained by the spouse whose affec-

68. Hostetter v. Green, 159 Ky. 611, 167 S. W. 919, L. R. A. 1915C, 870.

69. De Ford v. Johnson, — Mo. —, 158 S. W. 29, 46 L. R. A. (N. S.) 1083.

70. Michael v. Dunkle, 84 Ind. 545, 43 Am. Rep. 100; Wales v. Miner, 89 Ind. 118; Wood v. Mathews, 47 Ia. 411; De Ford v. Johnson, — Mo. —, 158 S. W. 29, 46 L. R. A. (N. S.) 1083.

71. De Ford v. Johnson, 251 Mo. 244, 158 S. W. 29, 46 L. R. A. (N. S.) 1083.

A statute providing that divorce forfeits marriage rights may have the effect of preventing an action for alienation after divorce. Hamilton v. McNeill, 150 Ia. 470, 129 N. W. 480.

That one sued for alienating plaintiff's former wife's affections was not a party to a divorce decree granted her for plaintiff's fault does not preclude him from pleading the decree within Code, § 3181, which provides that a divorce decree shall forfeit all rights of the guilty party acquired by the marriage. *Id.*

tions were alienated is no defence to the action by the wronged spouse.[72]

§ 1338. Sale of Drugs to Spouse.

At common law the wife had no right of action for wrongful interference with the marital relationship, and the only person deemed to be harmed by such interference was the head of the family. This was on the theory that the wife's personality was merged in the husband, but as by modern statutes this is changed, and the law now recognizes her legal equality with her husband, the reasoning of the common law no longer applies. Therefore, where the husband has been a victim of drugs, and had reformed, and the wife notified the defendant of this and asked him not to sell drugs to her husband, and the defendant did sell the husband drugs, as a consequence of which he again became addicted to them, the wife may recover for the loss of his consortium. The court remarks that the husband was no longer a free agent, as his will had become so weakened, and that the sale was the proximate cause of his downfall. The defendant must have known that just so sure as he sold the husband the poison he would inject it into his veins. The defendant must be held to have contemplated the natural and probable result of his own acts purposely committed. The right of the wife to consortium is invaded. Consortium is defined to be the conjugal fellowship of husband and wife, and the right of each to the company, co-operation, and aid of the other in every conjugal relation. This right is invaded whenever a third person, through machination, enticement, seduction or other wrongful, intentional, and malicious interference with the marriage relation deprives the husband or wife of the consortium of the other.

72. Hostetter v. Green, 159 Ky. 611, 167 S. W. 919; De Ford v. Johnson, 251 Mo. 244, 158 S. W. 29, 46 L. R. A. (N. S.) 1083; Keen v. Keen, 49 Ore. 362, 90 P. 147, 10 L. R. A. (N. S.) 504.

Malice sufficiently appears from the sales under these conditions, and it is not necessary to show hatred or ill-will.[73]

§ 1339. Damages.

Damages will not include damages for criminal conversation in an action for alienation only.[74]

In a wife's action the damages should include loss of support, consortium and mental anguish,[75] including injuries inflicted on the plaintiff by the spouse on account of the defendant's conduct even though the defendant was not present at the time;[76] may not include the fact that the spouse made a will in favor of the defendant, as marital rights do not include the right to have a will made in favor of the spouse;[77] may consider the defendant's malice shown.[78]

The prior estrangement of the married couple may be shown in mitigation of damages;[79] may show in mitigation that the plaintiff did not care for the spouse and had previously ill-treated her and been unfaithful;[80] that the erring spouse obtained a divorce may be pleaded in mitigation of damages,[81] and in some States punitive damages may be awarded on showing malice,[82] and in

73. Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N. E. 102, 40 L. R. A. (N. S.) 360.

74. A husband may not recover damages for criminal conversation on a declaration tendering an issue of alienation of affections only. Sweikhart v. Hanrahan, 184 Mich. 201, 150 N. W. 833.

75. Taylor v. Wilcox, 188 Ill. App. 18; Frederick v. Morse, 88 Vt. 126, 92 A. 16 (effect on plaintiff); Lupton v. Underwood, — Del. Super. —, 85 A. 965; Powell v. Strickland, 163 N. C. 393, 79 S. E. 872; Adkins v. Kendrick (Ky. 1909), 115 S. W. 814; Keath v. Shiffer, 37 Pa. Super. Ct. 573.

76. Townshend v. Townshend, 150 Ia. 243, 79 A. 388.

77. O'Gorman v. Pfeiffer, 130 N. Y. S. 77, 145 App. Div. 237.

78. Klein v. Klein, 31 Ky. Law Rep. 28, 101 S. W. 382.

79. Williamson v. Osenton (U. S. C. C. A.), 220 F. 653.

80. Allen v. Besecker, 105 N. Y. S. 416, 55 Misc. 366.

81. McNamara v. McAllister, 150 Ia. 243, 130 N. W. 26.

82. Scott v. O'Brien, 129 Ky. 1, 110 S. W. 260, 33 Ky. Law Rep. 450;

the federal courts exemplary damages are recoverable.[83] Substantial sums are commonly upheld,[84] but will be cut down when excessive.[85]

In States where compensatory damages only are recoverable evidence of the defendant's wealth is inadmissible in an action for alienation of affections. Error in admitting such evidence is not cured by an instruction to the jury to disregard it where from the size of the verdict it is evident that such direction was not obeyed.[86] In an action for alienation of affections it is error to admit evidence that the defendant told the plaintiff's husband of her great wealth unless coupled with evidence that the defendant held out this great wealth as an inducement to the plaintiff's husband to leave his wife and marry her.[87]

Damages should include anything happening up to the time of bringing suit.[88]

White v. White, 140 Wis. 538, 122 N. W. 1051.

83. Woldson v. Larson (U. S. C. C. A., Wash.), 164 F. 548.

84. White v. White, 101 Minn. 451, 112 N. W. 627 ($3,000); Roberts v. Jacobs (S. D.), 156 N. W. 589 ($4,000); Cochran v. Cochran, 111 N. Y. S. 588, 127 App. Div. 319 ($7,500); Fuller v. Robinson, 230 Mo. 22, 130 S. W. 343 ($10,000); Tillinghast v. Sawyer (R. I. 1907), 68 A. 478 ($4,500); Warnock v. Moore, 91 Kan. 262, 137 P. 959 ($7,250); Diedrich v. Swift, 178 Mich. 593, 146 N. W. 170 ($3,000); De Ford v. Johnson (Mo.), 177 S. W. 577 ($7.400).

85. Porter v. Heishman (Ia.), 154 N. W. 503 ($10,000); Warren v. Graham, 174 Ia. 162, 156 N. W. 323 ($4,875); Heisler v. Heisler (Ia. 1910), 127 N. W. 823 ($7,000); Phelps v. Bergers, 92 Neb. 851, 139 N. W. 632 ($16,666.67); Hendrick v. Biggar, 136 N. Y. S. 306, 151 App. Div. 522, mod. judg., 122 N. Y. S. 162, 66 Misc. 576 ($75,000); Phillips v. Thomas, 90 Wash. 533, 127 P. 97 ($25,000); Sivley v. Sivley, 96 Mass. 137, 51 So. 457; Allen v. Forsythe, 160 Mo. App. 262, 142 S. W. 820 ($6,000).

86. Phillips v. Thomas, 70 Wash. 533, 127 P. 97, 42 L. R. A. (N. S.) 582.

87. Phillips v. Thomas, 70 Wash. 533, 127 P. 97, 42 L. R. A. (N. S.) 582.

88. Slaton v. Milburn, 180 Ky. 655, 203 S. W. 529.

CHAPTER V.

CRIMINAL CONVERSATION.

SECTION 1340. Right of Action.
1341. Defences.
1342. Damages.

§ 1340. Right of Action.

In a suit for alienation of affections it is essential for the plaintiff to show that the defendant produced and brought about the alienation of the affections of the wife if the suit is brought by the husband, or of the husband if the suit is brought by the wife. It is permissible to prove, not for the purpose of establishing the cause of action, but in aggravation of damages, sexual intercourse, although such conduct is not essential to recovery. On the contrary, in a suit for criminal conversation the exact reverse is true. The action will fail without the proof of seduction, and it is not necessary to maintain the action that there be any proof of alienation of affections.[89] The husband has a right of action against the assailant of his wife for rape. The fact that the wife also has a right of action does not bar the husband, and his right grows out of his marital relations with the person upon whom the wrong was committed.[90]

Although the common-law rule prevented the wife from bringing

89. Merritt v. Cravens, 168 Ky. 155, 181 S. W. 970, L. R. A. 1917F, 935. "It must not be forgotten that the suit for alienation of affections is not one for the alienation of the plaintiff's affections but is one to recover for the alienation of the affections of the plaintiff's spouse." Watkins v. Lord, 31 Ida. 352, 171 P. 1133; Turner v. Heavrin (Ky.), 206 S. W. 23. See Hamilton v. McNeill, 150 Ia. 470, 129 N. W. 480.

90. Hirdes v. Cross (Mich.), 146 N. W. 646, 52 L. R. A. (N. S.) 373; Jacobson v. Siddal, 12 Ore. 280, 7 P. 108, 53 Am. R. 360; Lee v. Hammon, 114 Wis. 550, 90 N. W. 1073; Rigaut v. Gallisard, 7 Mod. 78.

an action for criminal conversation it is no longer applicable under modern statutes, and she may sue her husband's paramour.[91]

A husband or wife may settle his or her civil right of action for damages for criminal conversation with the spouse, but cannot settle a criminal prosecution for the wrong of the guilty spouse as such settlement would lead to intolerable abuses and is against public policy. Therefore a clause in an agreement of settlement of a claim for criminal conversation that the wronged person would do nothing to cause publicity of the crime is void, and a breach of it will give no right of action.[92]

An action for criminal conversation may exist independent of a cause of action for alienation,[93] and in such an action proof of sexual intercourse is necessary, but evidence of alienation of affections is unnecessary.[94] The defilement of the marriage bed is the gist of the action,[95] but alienation of affections may be shown as enhancing the damages,[96] and the issue is whether adultery has been committed without the consent or connivance of the spouse.[97] A legal marriage must be shown.[98]

§ 1341. Defences.

Connivance is a defence to the action, but the spouse may properly watch without being guilty of connivance.[99]

It is no defence that the spouse had been previously guilty of

91. Turner v. Heavrin (Ky. 1918), 182 Ky. 65, 206 S. W. 23, 4 A. L. R. 562; Dodge v. Rush, 28 App. D. C. 149.

92. McKenzie v. Lynch, 167 Mich. 583, 133 N. W. 490, 36 L. R. A. (N. S.) 995.

93. Barlow v. Barnes, 155 P. 457.

94. Merritt v. Cravens, 168 Ky. 155, 181 S. W. 970.

95. Scott v. O'Brien, 129 Ky. 1, 110 S. W. 260, 33 Ky. Law Rep. 450; Jenness v. Simpson, 84 Vt. 127, 78 A. 886.

96. Stark v. Johnson, 43 Colo. 243, 95 P. 930.

97. Rehling v. Brainard, 38 Nev. 16, 144 P. 167.

98. Jowett v. Wallace, 112 Me. 389, 92 A. 321.

99. Inderlied v. Bullen (N. J. Sup. 1910), 77 A. 469. See Baker v. Westing, 102 Neb. 840, 170 N. W. 168.

immoral conduct with others,[1] and it is no defence that the wronged spouse has condoned the adultery.[2]

The adultery of the complaining spouse is not a defence to the action.[3]

§ 1342. Damages.

The measure of damages for debauching a wife is the value of the wife's services to the husband, her conjugal aid, society and comfort, less the value of the husband's obligation to support her,[4] and the plaintiff's mental anguish and humiliation may also be considered,[5] but the damages will be less where the husband has deserted the wife;[6] and the fact that the plaintiff continued to cohabit with his wife after the seduction may be considered in mitigation of damages.[7] The fact that the husband made an opportunity for his wife to commit adultery may be considered in mitigation of damages,[8] and the wife's previous unchastity is a ground for mitigation of damages.[9]

The jury may in some States in their discretion award punitive damages.[10] Alienation of affection may be pleaded in aggravation of damages.[11]

1. Ruby v. Lawson (Ia.), 166 N. W. 481; Scheffler v. Robinson, 159 Mo. App. 527, 141 S. W. 485.

2. Swearingen v. Bray (Tex. Civ. App.), 157 S. W. 953.

3. Purdy v. Robinson, 117 N. Y. S. 295, 133 App. Div. 155.

4. Jenness v. Simpson, 84 Vt. 127, 78 A. 886.

5. Stark v. Johnson, 43 Colo. 243, 95 P. 930; Merritt v. Cravens, 168 Ky. 155, 181 S. W. 970; Baker v. Westing, 102 Neb. 840, 170 N. W. 168.

6. Berney v. Adriance, 142 N. Y. S. 748, 157 App. Div. 628.

7. Smith v. Hockenberry, 146 Mich. 7, 109 N. W. 23, 13 Det. Leg. N. 684; Rehling v. Brainard, 38 Nev. 16, 144 P. 167.

8. Inderlied v. Bullen (N. J. Sup. 1910), 77 A. 469.

9. Ruby v. Lawson (Ia.), 166 N. W. 481.

10. Jowett v. Wallace, 112 Me. 389, 92 A. 321.

11. Sullivan v. Valiquette (Colo.), 180 P. 91.

PART IX.

DISSOLUTION OF THE MARRIAGE RELATION BY DEATH.

CHAPTER I.

CURTESY.

SECTION 1343. Husband's Freehold; by Marriage in Wife's Real Estate.
1344. Husband's Enlarged Freehold as Tenant by the Curtesy.
1345. The Four Essentials of Curtesy at the Common Law.
1346. The Essential of Seisin.
1347. Birth of Issue, Curtesy Initiate.
1348. Equitable Estates.
1349. Life Estates and Remainders.
1350. Contingencies or Possessory Rights.
1351. Effects of Contracts.
1352. Land Limited to the Separate Use of the Wife.
1353. Joint Estates.
1354. Land Granted by Husband to Wife.
1355. Legislative Power to Modify Curtesy; Operation of Statutes.
1356. Statute Modifications.
1357. Husband's Rights as Tenant.
1358. Improvements by Husband and Other Claims.
1359. Husband's Rights of Action.
1360. Assignment of Curtesy.

§ 1343. Husband's Freehold; by Marriage in Wife's Real Estate.

The surviving husband's rights in the real estate of his deceased wife remain to be noticed. The immediate effect of coverture at common law, as we have seen, is to invest the husband with the usufruct of all real estate owned by the wife at the time of her marriage, and of all such as may come to her during coverture; this usufruct being in the nature of a freehold, with beneficial enjoyment of rents and profits, and lasting, at all events, during

their joint lives.[12] And, besides the rents and profits during coverture, the husband is entitled, as survivor, to all arrears accrued up to the time of his wife's death, together with the emblements or growing crops.[13]

§ 1344. Husband's Enlarged Freehold as Tenant by the Curtesy.

But the husband at the common law may acquire, upon a certain condition, an enlarged life interest in his wife's lands, and in estates of inheritance of which she was seised in possession during coverture, so as to extend beyond her life if he survives her; in other words, he may be a tenant by the curtesy,[14] taking a life estate in the property.[15]

Curtesy is a common-law right arising from the marriage relation,[16] favored in the law.[17] Tenancy by the curtesy, or tenancy by curtesy, is a freehold estate in the husband for the term of his natural life. He acquires it by the fact that a child capable of inheritance is born of the marriage. The meaning of the term is somewhat obscure. Some have thought the word "curtesy" signifies the favor or curtesy with which the law regards the husband. Others that it comes from the Latin word *curtis,* and has reference to the feudal custom which permitted the husband, as soon as a son was born, to attend court as one of the *pares curiæ,* and do homage without his wife. But there is reason to believe that ten-

12. *Supra,* § 145 *et seq.*

13. *Ib;* Matthews v. Copeland, 79 N. C. 493.

14. See *supra,* § 186 *et seq.*

15. Farley v. Stacey, 177 Ky. 109, 197 S. W. 636; Powell v. Powell, 267 Mo. 117, 183 S. W. 625, 188 S. W. 795; Healey v. Tillberry, 192 Mo. App. 509, 183 S. W. 666; Withnell v. Withnell, 69 Neb. 605, 96 N. W. 221; Reese v. Stires, 87 N. J. Eq. 32, 103 A. 679. See Maclaren v. Stone, 18 Ohio Cir. Ct. R. 854, 9 O. C. D. 794 (husband's dower of same quality as wife's).

16. Armstrong v. Wood, 195 F. 137; Scott v. Coulson, 156 Ala. 450, 47 So. 60; Waddle v. Frazier, 245 Mo. 391, 151 S. W. 87; *In re* Starbuck's Estate, 116 N. Y. S. 1030, 63 Misc. 156, 122 N. Y. S. 584, 137 App. Div. 866, order affd. 201 N. Y. 531, 94 N. E. 1098; Baxter v. Patenaude, 32 R. I. 197, 78 A. 625.

17. Register v. Elder, 231 Mo. App. 321, 132 S. W. 699; Shannon v. Watt,

ancy by the curtesy existed in the civil law during the reign of Constantine.[18]

This privilege of the husband extends to all lands and tenements of which the wife was seised at any time during coverture, whether legal or trust estate, whether in fee-simple or by way of remainder or reversion.[19] The common law affords herein a rare but positive instance of public policy discriminating in favor of a marriage accompanied by the propagation of children.

§ 1345. The Four Essentials of Curtesy at the Common Law.

Four things are essential, at common law, to entitle a husband to curtesy: *First,* A lawful marriage. *Second,* Seisin of the wife at some time during coverture. *Third,* Birth alive of issue capable of inheritance. *Fourth,* Death of the wife. After the birth of the child the husband's title to curtesy becomes possible; and the curtesy is then initiate. After the death of the wife the title to curtesy becomes complete; and the curtesy is then consummate.[20] For a full description of curtesy, with its incidents, the reader is referred to elementary works on the law of Real Estate.[21]

§ 1346. The Essential of Seisin.

Questions concerning the husband's curtesy are most commonly raised, however, with reference to the second essential above stated, namely, seisin of the wife at some time during coverture. Chan-

87 N. J. Eq. 611, 101 A. 251, 99 A. 114.

18. 1 Wash. Real Prop. 128, and authorities cited; 2 Bl. Com. 126 and notes by Chitty and others; Wright Ten. 193, 194; 2 Bright Hus. & Wife, 116.

19. *Ib.;* Co. Litt. 30 a; *ib.* 29 a, n. 165; Watts v. Ball, 1 P. Wms. 109.

20. 1 Washb. Real Prop. 130; Register v. Elder, 231 Mo. App. 321, 132 S. W. 699; Richardson v. Richardson, 150 N. C. 549, 64 S. E. 510; Hackensack Trust Co. v. Tracy, 86 N. J. Eq. 301, 99 A. 846; *In re* Starbuck's Estate, 116 N. Y. S. 1030, 63 Misc. 156, 122 N. Y. S. 584, 137 App. Div. 866, order affd., 201 N. Y. 531, 94 N. E. 1098; Day v. Burgess, 139 Tenn. 572, 202 S. W. 911; Bennett v. Camp (Vt. 1882), 54 Vt. 36; Carpenter v. Garrett, 75 Va. 129.

21. See 1 Washb. Real Prop. 127 *et seq.;* Williams, Real Prop., 8th ed., 218; 4 Kent Com. 27-35.

cellor Kent says[22] that the wife, according to the English law, must have been seised in fact and in deed, and not merely of a seisin in law, of some estate of inheritance. But he admits that this rule was relaxed in equity by a free and liberal construction; and he further intimates that in Connecticut, if not in some other parts of this country, there was a disposition to carry the principle still further. Seisin in law, without actual entry, is in many States at the present day deemed sufficient to give curtesy,[23] although neither husband nor wife ever resided upon the land or exercised acts of ownership over it,[24] and receipt of the rents and profits may be enough to show seisin.[25]

Curtesy exists in a fee of any kind however arising, as in a determinate fee,[26] in land inherited by the wife from her family,[27] in lands which the husband has bought and had conveyed in fee to the wife,[28] through a third party,[29] in land which he has voluntarily settled upon her in fee,[30] in lands deeded to a wife and her "heirs" or "descendants,"[31] but not in an estate less than freehold.[32] By statute in some States curtesy exists only in lands of which the wife dies seised.[33]

22. 4 Kent Com. 29, 30.

23. Jenkins v. Woodward Iron Co., 61 So. 646; Miles v. Miles (Okla.), 175 P. 222; Runyan v. Winstock, 104 P. 417, motion for reh. den., 55 Ore. 202, 105 P. 895; *In re* Sanders' Estate, 41 Pa. Super. Ct. 77; Wass v. Bucknam, 38 Me. 356; Watkins v. Thornton, 11 Ohio St. 367; Rabb v. Griffin, 26 Miss. 579; Stephens v. Hume, 25 Miss. 349.

24. Ellis v. Dittey, 94 Ky. 620, 23 S. W. 366, 15 Ky. Law Rep. 378.

25. Frey v. Allen, 9 App. D. C. 400.

26. Carter v. Couch, 157 Ala. 470, 47 So. 1006, 20 L. R. A. (N. S.) 858.

27. Dake v. Sewell, 145 Ala. 581, 39 So. 819; Yung v. Blake, 148 N. Y. S. 557, 163 App. Div. 501; Graham v. Graham, 10 W. Va. 355.

28. Hull v. Hull, 139 Tenn. 572, 202 S. W. 914.

29. *In re* Kaufmann (U. S. D. C. Wis. 1908), 142 F. 898.

30. Hughes v. Saffell, 134 Ky. 175, 119 S. W. 804; Depue v. Miller, 65 W. Va. 120, 64 S. E. 740.

31. Wood v. Reamer, 118 Ky. 841, 82 S. W. 572, 26 Ky. Law Rep. 819; Chavis v. Chavis, 57 S. C. 173, 35 S. E. 507.

32. Hall v. Crabb, 56 Neb. 392, 76 N. W. 865.

33. Spangler v. Vermillion, 80 W. Va. 75, 92 S. E. 449.

§ 1347. Birth of Issue, Curtesy Initiate.

Upon the birth of the child of a marriage alive, tenancy in the husband's right to curtesy is said to be initiate, and afterwards, upon his wife's predecease, consummate.[34] "Tenancy by the curtesy initiate, at common law, was an estate which became vested at the birth of issue, and became an estate of the curtesy, proper or consummate, at the death of the wife before that of the husband. It was held to be an estate distinct from that of the wife, alienable by the husband and subject to execution for his debts, and giving to him control of the profits from the wife's lands. It is said that the curtesy, by the laws of England, was given the husband, in part, for the purpose of aiding him in supporting and educating the issue of the marriage. That this was a minor consideration, however, is shown by the fact that continued existence of the issue after birth was not necessary to raise or to support the estate. The early writers on the common law disclose that a deeper reason lay in the feudal system which obtained in England in early times, and which affected real property in so many ways. The husband, having become dignified by having an interest in lands, was bound to do homage to his superior lord; and the interest, being once vested in him, it was the policy of the feudal system not to suffer it to determine during the life of the husband, as otherwise the lord might lose the homage that was his due from the land. To this estate the husband never had any natural right." [35]

Curtesy is initiate from the time of seisin and the birth of issue alive, and unless it is defeated by will or deed, becomes consummate on the wife's death, and relates back to the time it became initiate.[36] Where no child is born of the marriage the husband

34. Powll v. Powell, 267 Mo. 117, 188 S. W. 795; Guernsey v. Lazear, 51 W. Va. 328, 41 S. E. 405; McNeeley v. South Penn Oil Co., 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562.

35. Per Williams, J., in Day v. Burgess, 139 Tenn. 559, 202 S. W. 911, L. R. A. 1918E, 692.

36. Hackensack Trust Co. v. Tracy, 86 N. J. Eq. 301, 99 A. 846; *In re* Starbuck's Estate, 116 N. Y. S. 1030, 63 Misc. 156; Day v. Burgess, 139 Tenn. 559, 202 S. W. 911.

is not entitled to curtesy initiate,[37] but after issue born the husband has a vested right called an inchoate right of curtesy or curtesy initiate.[38]

Curtesy depends on the birth of children and not on their survival. So even if all the children should die in early infancy, leaving the father wholly unburdened with the duty of supporting any child, still if he survives the wife he would be entitled to curtesy if the other requisites existed. So if some of the children are stepchildren being born of the mother by a former marriage, still if there are any children of the second marriage the second husband is entitled to curtesy.[39] The birth of issue is enough whether before or after the acquisition of the land, and it is immaterial whether such issue be living or dead at the time of the seisin or at the wife's death.[40] The birth of issue capable of inheriting must occur, so where the inheritance is in tail male, birth of a female child is not enough.[41]

§ 1348. Equitable Estates.

To entitle a husband to curtesy in the wife's equitable estate of inheritance, it is only needful that the requisites of such a title in legal estates existed. Actual possession of the estate, or the receipt of rents, issues, and profits by her, or possession by her trustee for her benefit, is a seisin of equitable estate equivalent to legal seisin,

37. New York, N. H. & H. R. Co. v. Russell, 83 Conn. 581, 78 A. 324; Shepard v. Browning, 156 Ky. 194, 160 S. W. 950; Richter v. Bohnsack, 144 Mo. 516, 46 S. W. 748; Soehngen v. Jantzen (Mo. App.), 186 S. W. 1109; Richardson v. Richardson, 150 N. C. 549, 64 S. E. 510; Norwood v. Totten, 166 N. C. 648, 82 S. E. 951; Murdock v. Murdock, 74 N. H. 77, 65 A. 392 (adopted child not enough); Craig v. Smith, 84 N. J. Eq. 593, 95 A. 194; Duggins v. Woodson, 84 S. E. 652; *contra*, Alderson's Adm'r v. Alderson, 46 W. Va. 242, 33 S. E. 228.

38. Hackensack Trust Co. v. Tracy, 86 N. J. Eq. 301, 99 A. 846.

39. Travis v. Sitz (Tenn.), 185 S. W. 1075, L. R. A. 1917A, 671.

40. Donovan v. Griffith, 215 Mo. 149, 114 S. W. 621; Travis v. Sitz (Tenn.), 185 S. W. 1075.

41. Fleming v. Sexton, 172 N. C. 250, 90 S. E. 247.

and sufficient,[42] but not where the husband by conveyance creates an equitable estate in the wife.[43]

An antenuptial or postnuptial settlement by the husband upon his wife is not necessarily inconsistent with his rights of curtesy on surviving her.[44] And the right extends to equities of redemption, contingent uses, and moneys directed to be laid out in lands for the wife's benefit; which moneys equity treats as land.[45] Curtesy may be retained even out of lands conveyed by the wife in a deed of trust as surety for the husband's debts,[46] but not in land held by the wife in trust.[47]

§ 1349. Life Estates and Remainders.

An estate for the wife's own life terminates, of course, at her death, and the surviving husband has no concern with it; but if it be for the life of another person who survives her, the husband takes the profits during the remnant of the term as special occupant.[48]

But the husband cannot be tenant by the curtesy of the wife's

42. Jackson v. Becktold Printing & Book Mfg. Co., 86 Ark. 591, 112 S. W. 161; *In re* Morton's Estate, 24 Pa. Super. Ct. 246; Cushing v. Blake, 30 N. J. Eq. 689. Possession by the husband as legal trustee is sufficient. Taylor v. Smith, 54 Miss. 50.

43. Jones v. Jones' Ex'r, 96 Va. 749, 32 S. E. 463; *contra*, Ball v. Ball, 20 R. I. 520, 40 A. 234.

44. Frazier v. Hightower, 12 Heisk. 94; Cushing v. Blake, 29 N. J. Eq. 399, 1 Washb. 133. But as to an unqualified postnuptial settlement of all real estate upon his wife, see Sayers v. Wall, 26 Gratt. 354.

45. 1 Washb. Real Prop. 130, 131, and cases cited. In many of the States curtesy is given, under statutes not recent, in equitable estates of which the wife was seised. *Ib.*; 1 Bro. C. C. 503, n. American ed.

46. Barkhoefer v. Barkhoefer, 93 Mo. App. 373, 67 S. W. 674. See Stratton v. Robinson, 28 Tex. Civ. App. 285, 67 S. W. 539.

47. Rivers v. Morris, 25 Ky. Law Rep. 1416, 78 S. W. 196; Norton v. McDevit, 122 N. C. 755, 30 S. E. 24; Baker v. Baker, 75 N. J. Eq. 305, 72 A. 1000.

48. 2 Kent Com. 134; 1 Bright Hus. & Wife, 112, 113; *supra*, § 194.

The husband has no curtesy in the wife's real estate. Smith v. Bachus, 70 So. 261; Waller v. Martin, 106 Tenn. 341, 61 S. W. 73, 82 Am. St. R. 882.

estate in reversion or remainder while there is an outstanding life estate not terminated; her interest must fall into possession before he acquires an inchoate right of which either he or his creditors can take advantage;[49] for there can be no curtesy where there was no seisin. And hence questions of great subtlety and difficulty may arise in respect to determinable estates, such as estates tail; while to complicate the issue still further, actual legal seisin with a formal entry is not held indispensable as formerly.[50] Where the wife has a remainder and dies before the death of the life tenant she was never seised of the land, title passing directly to her heirs, so that her husband did not take curtesy therein,[51] and where the

49. Ferguson v. Tweedy, 43 N. Y. 543; Gibbins v. Eyden, L. R. 7 Eq. 371; Shores v. Carley, 8 Allen, 425; Moore v. Calvert, 6 Bush, 356; Hatfield v. Sneden, 54 N. Y. 280.

50. 1 Washb. 130, 131. An intermediate estate less than a freehold, as a mere lease for years, would not defeat curtesy in the remainder or reversion. Withers v. Jenkins, 14 S. C. 597. Where the wife takes by devise an estate in fee, limited by an executory devise, which defeats or abridges the fee in case of the happening of a certain event this is sufficient seisin to give the husband curtesy. Hatfield v. Sneden, 54 N. Y. 280. As to seisin held insufficient in lands of which the wife's mother was endowed, see Upchurch v. Anderson, 59 Tenn. 410.

51. Owens v. Jabine, 88 Ark. 468, 115 S. W. 383; *In re* Davis' Estate, 95 A. 293; Stebbins v. Petty, 209 Ill. 291, 70 N. E. 673, 101 Am. St. R. 243; Hunt v. Phillips, 32 Ky. Law Rep. 257, 105 S. W. 445; Maupin v. Maupin's Guardian, 33 Ky. Law Rep. 658, 110 S. W. 840; Cochran v. Thomas, 131 Mo. 258, 33 S. W. 6; Martin v. Trail, 142 Mo. 85, 43 S. W. 655; Cox v. Boyce, 152 Mo. 576, 54 S. W. 467, 75 Am. St. R. 483; Cox v. Hunter, 152 Mo. 584, 54 S. W. 1102; Dozier v. Toalson, 180 Mo. 546, 79 S. W. 420, 103 Am. St. R. 586; Majors v. Cryts, 240 Mo. 386, 144 S. W. 769; *In re* Dixon, 156 N. C. 26, 72 S. E. 71; Collins v. Russell, 184 N. Y. 74, 76 N. E. 731, 112 Am. St. R. 569, affg. 89 N. Y. S. 414, 96 App. Div. 136, 15 N. Y. Ann. Cas. 220; Moore v. Iles, 16 Ohio Cir. Ct. R. 591, 9 O. C. D. 418; Landis v. Marsh, 32 Ohio Cir. Ct. R. 399; Brandmeier v. Pond Creek Coal Co., 219 Pa. 19, 67 A. 951.

Where dower is assigned to the wife's mother who survives the wife the daughter's husband on the death of the mother is not entitled to curtesy in the wife's rights in the property assigned to the mother as dower. Appeal of Ward, 75 Conn. 598, 54 A. 730; Howells v. McGraw, 90 N. Y. S. 1, 97 App. Div. 460.

life tenant dies before the wife, and thereafter the land is in the adverse possession of a third party, there is no curtesy.[52]

Curtesy, however, will attach where the intervening estate terminates before the wife's death,[53] and where the wife, being seised, conveys to another a life estate, and dies before the life tenant, curtesy will attach.[54] A statute giving the husband curtesy in the wife's real property gives him curtesy in a vested remainder.[55]

§ 1350. Contingencies or Possessory Rights.

Curtesy exists in land occupied adversely by the wife for the statutory period,[56] or where the wife has possession under color of title,[57] but not in a mere possessory right,[58] or in a mere right of action,[59] or in a mere contingency never vested,[60] or in government lands not vested by sufficient length of possession.[61]

§ 1351. Effect of Contracts.

One marrying a woman with notice that she has made a binding contract to convey her land is not entitled to curtesy in that land in equity,[62] and curtesy will not attach in lands held by the wife under a contract of purchase.[63] An agreement by the wife with her brothers and sisters for a sufficient consideration not to par-

52. Parsons v. Justice, 163 Ky. 737, 174 S. W. 725.

53. Potts v. Shirley, 28 Ky. Law Rep. 872, 90 S. W. 590.

54. Valentine v. Hutchinson, 88 N. Y. S. 862, 43 Misc. 314.

55. Jenkins v. Woodward Iron Co., 69 So. 646; Snyder v. Jones, 99 Md. 693, 59 A. 118.

56. Smith v. Cross, 125 Tenn. 159, 140 S. W. 1060.

57. Vidmer v. Lloyd, 184 Ala. 153, 63 So. 943.

58. Brown v. Watkins, 98 Tenn. 454, 40 S. W. 480.

59. Evans v. Morris, 234 Mo. 177, 136 S. W. 408.

60. Jones v. Whichard, 163 N. C. 241, 79 S. E. 503.

61. Quinn v. Ladd, 37 Ore. 261, 59 P. 457 (where homestead rights not vested); Crowley v. Grant, 63 Ore. 212, 127 P. 28.

62. Dooley v. Merrill, 216 Mass. 500, 104 N. E. 345.

63. *In re* Grandjean's Estate, 110 N. W. 1108; Grandjean v. Beyl, *Id.*, judg. affd. on reh., 78 Neb. 354, 114 N. W. 414.

tition her interest in her father's estate during the life of her mother is binding on the husband's curtesy right.[64]

§ 1352. Land Limited to the Separate Use of the Wife.

As for real estate settled or devised to the wife's separate use, curtesy originally could not be claimed of a use; but modern equity does not regard the husband as deprived of his usual right of curtesy in such property upon surviving the wife,[65] unless by the clear terms of the trust he has been excluded therefrom.[66] Hence curtesy does not exist where land is granted to the separate use of the wife in language excluding all his marital rights,[67] or in the statutory separate estate of the wife which the husband has created for her benefit without reserving to himself his marital rights.[68] And while the rule of equity is that the wife may exercise her power of disposition over separate property during her lifetime (not to speak of rights of testamentary disposition), her sole conveyance cannot generally be regarded as a regular disposition effectually to exclude curtesy.[69]

64. Mathews v. Glockel, 82 Neb. 207, 117 N. W. 404.

65. Lushington v. Sewell, 1 Sim. 548; Roberts v. Dixwell, 1 Atk. 606; Appleton v. Rowley, L. R. 8 Eq. 139; Cooper v. Macdonald, L. R. 7 Ch. D. 288; *supra*, § 196; Eager v. Furnivall, L. R. 17 Ch. D. 115; Young v. Langbein, 14 N. Y. Supr. 151.

66. Moore v. Webster, L. R. 3 Eq. 267; Withers v. Jenkins, 14 S. C. 597 (such exclusion must be clearly expressed). Cushing v. Blake, 30 N. J. 689; Ege v. Medlar, 82 Pa. St. 86.

67. Lee v. Belknap, 163 Ky. 418, 173 S. W. 1129; McBreen v. McBreen, 154 Mo. 323, 55 S. W. 463, 77 Am. St. R. 758; Jamison v. Zausch, 227 Mo. 406, 126 S. W. 1023.

A deed to a woman "and her heirs, free from the debts, liabilities or contracts of her husband if she should every marry" shows no intention to bar curtesy. Travis v. Sitz (Tenn.), 185 S. W. 1075; Chapman v. Price, 83 Va. 392, 11 S. E. 879. See Buschemeyer v. Klein, 139 Ky. 124, 129 S. W. 551.

Curtesy may exist in the wife's equitable estate limited to her separate use. McTigue v. McTigue, 116 Mo. 138, 22 S. W. 501; Woodward v. Woodward, 148 Mo. 241, 49 S. W. 1001; Miller v. Quick, 158 Mo. 495, 59 S. W. 955; Donovan v. Griffith, 215 Mo. 149, 114 S. W. 621.

68. Ratliff v. Ratliff, 102 Va. 880, 47 S. E. 1007.

69. *Supra*, §§ —, —, —; Stokes v. McKibbin, 13 Pa. St. 267; Pool v.

The husband is entitled to his curtesy rights even in land granted to the wife free from the debts of the husband where the deed was to the wife " and her heirs." [70]

§ 1353. Joint Estates.

Curtesy exists in property held by the wife as tenant in common,[71] or as joint tenant,[72] or in land subject to liens of joint debts.[73]

§ 1354. Land Granted by Husband to Wife.

A deed from husband to wife to her separate use gives her full title free of curtesy,[74] but otherwise the husband will retain curtesy in lands he has quitclaimed to his wife.[75]

§ 1355. Legislative Power to Modify Curtesy; Operation of Statutes.

The legislative power to modify tenancy by curtesy is the same as the power to modify the rules of descent, and does not interfere with any constitutional right of the husband,[76] and the husband's curtesy rights may be cut off by legislation enacted before the birth of a child, as until then his rights were contingent and not vested,[77]

Blakie, 53 Ill. 495. But see as to the wife's technical right to bar entail and curtesy, where an equitable tenant in tail, Cooper v. Macdonald, L. R. 7 Ch. D. 288. And see Robinson v. Buck, 71 Pa. St. 386.

70. Travis v. Sitz (Tenn.), 185 S. W. 1075, L. R. A. 1917A, 671.

71. Rhodes v. Robie, 9 App. D. C. 305; Carr v. Givens, 7 Bush (Ky.), 679; Bragg v. Wiseman, 55 W. Va. 330, 47 S. E. 90.

72. City of Clinton v. Franklin, 119 Ky. 143, 83 S. W. 142, 26 Ky. Law Rep. 1053; McNeeley v. South Penn Oil Co., 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562.

73. Gilkison v. Gore, 79 W. Va. 549, 91 S. E. 395.

74. Bingham v. Weller, 113 Tenn. 70, 81 S. W. 843, 69 L. R. A. 370, 106 Am. St. R. 803.

75. *In re* McCarty's Estate, 3 Alaska, 242; *contra*, Depue v. Miller, 65 W. Va. 120, 64 S. E. 740.

76. Brown v. Clark, 44 Mich. 309, 6 N. W. 679.

77. Phillips v. Farley, 112 Ky. 837, 66 S. W. 1006, 23 Ky. Law Rep. 2201; Richardson v. Richardson, 150 N. C. 549, 64 S. E. 510. See, however, Dillon v. Dillon, 24 Ky. Law Rep. 781, 69 S. W. 1099. See Shannon v. Watt, 87 N. J. Eq. 142, 99 A. 114. See

as mere marriage prior to the passage of an act altering curtesy does not prevent the application of the act to him,[78] but a statute affecting curtesy will not alter a husband's rights of curtesy initiate acquired before its passage,[79] but will affect his curtesy in lands acquired after its passage.[80]

§ 1356. Statute Modifications.

Of late years tenancy by the curtesy has become practically infrequent in England by reason of the prevalence of marriage settlements excluding such right.[81]

Not only did the common-law rule of curtesy fail to find bases on natural or moral right; the estate, introduced into the mother country from Normandy for feudal reasons, could not long stand in full virtue as a thing that harmonized with the principles of American democracy; so that, after a few generations of reverence for the ancient rule, the legislatures of this country began to abolish curtesy initiate entirely, or to deprive that particular tenancy of some of its more rigorous features, until now it stands greatly and essentially modified, or has been abolished absolutely, in many States.

Features at first thus stripped from the estate initiate were the

Hull v. Hull, 139 Tenn. 572, 202 S. W. 914.

78. Hall v. Craft, 30 Ky. Law Rep. 1127, 100 S. W. 236; Hallyburton v. Slagle, 132 N. C. 947, 44 S. E. 655.

Former marriage. A statute providing that if any deceased wife leaves issue by a "former marriage" the surviving husband shall not be entitled to curtesy applies, although the former husband was the same man as the widower. Blum v. Blum, 60 Ohio St. 41, 53 N. E. 493; Alderson's Adm'r v. Alderson, 46 W. Va. 242, 33 S. E. 228. See Hall v. Moore, 32 Ky. Law Rep. 56, 105 S. W. 414.

79. Jeavons v. Pittman, 126 Md. 650, 95 A. 1070; Clay v. Mayer, 144 Mo. 376, 46 S. W. 157; Myers v. Hansbrough, 202 Mo. 495, 100 S. W. 1137; Hackensack Trust Co. v. Tracy, 86 N. J. Eq. 301, 99 A. 846.

80. *Ex parte* Watts, 130 N. C. 237, 41 S. E. 289. See Day v. Burgess, 139 Tenn. 559, 202 S. W. 911 (husband's curtesy initiate made a contingent right by statute although child born before enactment of statute).

81. Wms. Real Prop. 187; 1 Washb. Real Prop. 129.

right of the husband, as tenant, to sell and transfer the realty of the wife, and the right of his creditors to sell it under execution for his debts. As applied to curtesy initiate, the common-law rule worked a deprivation of the wife of the use of her own property during the life of her husband, and the wonder is that the rank injustice of it had to call so long for remedy at the hands of chivalrous legislators of America.

In all or nearly all of the States statutes have been passed enlarging the rights and powers of married women in respect to their real property. In many instances this is done by prohibiting the sale by the husband of his wife's realty, without her joining in the conveyance, and protecting the property from levy and sale under judgment or decree against the husband.

Decisions are not entirely uniform in the several jurisdictions as to the effect of such a statute upon the common-law estate of the curtesy initiate. Probably the soundest conception of the situation produced by such legislation is to treat the curtesy initiate as not abolished or entirely destroyed, but as reduced from an estate that is vested to a right that is contingent. In this view the husband has not an estate, but, more properly speaking, a status, entitling him to an estate by the curtesy consummate on the contingency that his wife dies. The precedent birth of a living child then becomes a mere condition of the vestiture of the etsate by the curtesy consummate; and it is no longer the factor which creates in the husband a vested estate by the curtesy initiate.[82] Therefore a statute providing that a married woman shall have the same capacity to acquire, hold, manage, control and dispose of all her property as if unmarried effects this result, and a clause that the husband's rights by curtesy shall not be affected will be held applicable only to curtesy consummate.[83]

82. Per Williams, J., in Day v. Burgess, 139 Tenn. 559, 202 S. W. 911, L. R. A. 1918E, 692.

83. McNeer v. McNeer, 142 Ill. 388, 32 N. E. 681, 19 L. R. A. 256; Stewart v. Ross, 50 Miss. 776; Day v. Burgess, 139 Tenn. 559, 202 S. W. 911, L. R. A. 1918E, 692.

In this country curtesy has existed in all of the older States, but is modi-

The Married Women's Acts in the usual form, providing that a married woman shall hold her separate estate free from the control of her husband or liability for his debts, do not affect curtesy,[84]

fied in some of them, expressly or by implication, by late statutes. In Iowa and Indiana, curtesy is expressly abolished, and a certain defined interest in the wife's real estate, of the dower sort, goes to her husband instead by way of inheritance. In Texas, California, Louisana, and other States where the tenure of real estate comes from the community or civil law, rather than the common law, curtesy is not recognized. In some of the States the right of curtesy appears to be denied to husbands who wilfully neglect and desert their wives. In most New England States, as Maine, Vermont, Massachusetts, and Rhode Island, and in various other parts of the country, tenancy by the curtesy is expressly reserved by statute.

See statutes of different States cited in 1 Washb. Real Prop. 258, and note; and notes to 4 Kent Com. 34. Statute provisions as to curtesy and dower are frequently alike. And see, as to the effect of the wife's deed of trust of her land in Iowa, where the husband did not release his "dower interest," and a sale was subsequently made under the trust. Huston v. Seeley, 27 Ia. 183. For the law of Michigan, see Hill v. Chambers, 30 Mich. 422. As to the "dower" share, see also Smith v. Zuckmeyer, 53 Ia. 14, which declares it limited, as to either husband or wife, to one-third interest. See also Noble v. Noble, 19 Ind. 431; Conrad v. Starr, 50 Ia. 470. It is decided that curtesy still exists in New York, though doubts were at one time entertained. Hatfield v. Sneden, 54 N. Y. 280; Young v. Langbein, 14 N. Y. Supr. 15. Cf. Hurd v. Cass, 9 Barb. 366; Clark v. Clark, 24 Barb. 581, with Billings v. Baker, 28 Barb. 343. *Semble* that the wife may here, under statute, defeat her husband's curtesy by her separate conveyance. Thurber v. Townshend, 22 N. Y. 517, which, of course, must be contrary to rule. Curtesy prevails in Illinois, Minnesota, Missouri, Wisconsin, Kentucky, Tennessee, Mississippi, and in nearly all the original thirteen States besides, notwithstanding married women's acts. Armstrong v. Wilson, 60 Ill. 226; 1 Washb. Real Prop. 129. In South Carolina and Georgia the interest of the husband in his deceased wife's real estate is an absolute one in fee. Hooper v. Howell, 52 Ga. 315; 1 Washb. 129. Ohio and Oregon statutes confer curtesy regardless of the birth of a child. 1 Washb. 129; Elliott v. Teal, 5 Sawyer, 249.

84. Hanneman v. Richter, 177 F. 563; Deutsch v. Rohlfing, 22 Colo. App. 543, 126 P. 1123 (no curtesy recognized); Myers v. Hansbrough, 202 Mo. 495, 100 S. W. 1137; Johnson v. Simpson, 40 Okla. 413, 139 P. 129; Irving v. Diamond, 40 Okla. 438, 139 P. 515; Runyan v. Winstock, 104 P. 417, motion for rehearing denied, 55 Ore. 202, 105 P. 895; Alderson's Adm'r v. Alderson, 46 W. Va. 242, 33 S. E. 228. See Loyd v. Planters' Mut. Ins. Co., 80 Ark. 486, 97 S. W. 658; Porch v. Fries, 3 C. E. Green

but under an act providing that the property of a married woman shall remain her own, and may be devised as if she were *sole,* the husband has no curtesy rights in land devised by her.[85] A statute as to the separate estates of married women is not applicable to equitable estates and does not affect curtesy therein.[86]

§ 1357. Husband's Rights as Tenant.

The estate devolving thus upon the husband, without requiring further formalities on his part, and regardless of the circumstance of child or children still surviving, he enjoys the usual rights of a life tenant in his own right, including those of occupation; enjoying rents and profits during his term, together with his necessary fuel and other so-called reasonable *estovers,* and at his death leaving to his executors and administrators the right to obtain *emblements* or profits of the growing crop.[87]

The tenant by curtesy is entitled to possession during his life which cannot be taken away by the heirs of his wife,[88] and rent

(N. J.), 204; Lynde v. McGregor, 13 Allen, 182

85. Tiddy v. Graves, 126 N. C. 620, 36 S. E. 127; s. c., 127 N. C. 502, 37 S. E. 513; Deese v. Deese, 176 N. C. 527, 97 S. E. 475.

The Married Woman's Act giving the wife the right to dispose of her property independent of her husband destroys curtesy initiate, and leaves the husband only expectancy. Riggs v. Price, — Mo. —, 210 S. W. 420.

86. Jones v. Jones' Ex'r, 96 Va. 749, 33 S. E. 228.

87. See I Washb. Real Prop., 88 *et seq.,* as to life tenants in general; *supra,* § 191; Armstrong v. Wilson, 60 Ill. 226. Where the land is in another's possession at the time of the wife's death, and no state of facts debars the surviving husband's right to curtesy, the husband may recover possession by action. Hall v. Hall, 32 Ohio St. 184. And see Nesbitt v. Trindle, 64 Ind. 183. But a lawful lessee ought to remain undisturbed during his term. Forbes v. Sweesy, 8 Neb. 520.

While the husband holds land as tenant by curtesy, those deriving title from his deceased wife cannot sue during his life. Miller v. Bledsoe, 61 Mo. 96. But the wife's heirs, who are remaindermen in fee of an equitable estate where the husband holds legal title as trustee of a resulting trust, may compel the life tenant by the curtesy, or his assignee, to convey to them the legal title in remainder. Taylor v. Smith, 54 Miss. 50.

88. Miller v. Bledsoe, 61 Mo. 96.

cannot be recovered against a husband and his son who together occupy premises in which he has curtesy.[89] A tenant by curtesy cannot license another to commit waste,[90] as by giving another a license to take mineral[91] or timber,[92] but the husband as tenant by the curtesy is entitled to the royalties on land owned by the wife for coal mining after her death.[93]

As the tenant by curtesy is at least a *quasi* trustee for remaindermen, he cannot acquire title by adverse possession against them.[94]

§ 1358. Improvements by Husband and Other Claims.

So the general rule is strict as regards improvements made by the husband upon his wife's real estate. The English doctrine is, that if the husband erects buildings upon his wife's lands, or otherwise makes permanent improvements thereon, expending his own money for such purpose, the presumption is that he intended the expense for his wife's benefit, and he cannot recover for it.[95] Several cases of this sort have come before our own courts, the claims being usually presented after the wife's death; and this principle has been rigidly applied, though doubtless occasioning in some instances positive hardship and wrong.[96] And since the husband

89. Voss v. Stortz, 177 Ky. 541, 197 S. W. 964.

90. Potomac Dredging Co. v. Smoot, 108 Md. 54, 69 A. 507.

91. Barnsdall v. Boley (U. S. C. C. W. Va. 1902), 119 F. 191 (oil); Deffenbaugh v. Hess, 225 Pa. 638, 74 A. 608 (cannot touch unopened mines).

92. McLeod v. Dial, 63 Ark. 10, 37 S. W. 306; Kentucky Stave Co. v. Page (Ky. 1910), 125 S. W. 170; Learned v. Ogden, 80 Miss. 769, 32 So. 278, 92 Am. St. R. 621.

93. Bubb v. Bubb, 201 Pa. 212, 50 A. 759; Alderson's Adm'r v. Alderson, 46 W. Va. 242, 33 S. E. 228.

94. Smith v. Cross, 125 Tenn. 159, 140 S. W. 1060.

95. 1 Roper Hus. & Wife, 54; Campion v. Cotton, 17 Ves. 264; 1 Washb. Real Prop. 281.

96. Burleigh v. Coffin, 2 Fost. 118; White v. Hildreth, 32 Vt. 265; Brevard v. Jones, 50 Ala. 221. And see Washburn v. Sproat, 16 Mass. 449.

The surviving husband cannot be reimbursed for the amount expended by him in improving the wife's real estate, as a presumption arises in all such cases the consideration and motive of the husband was that he would be reimbursed by use and enjoyment of the land. Nall v. Miller, 95 Ky.

has no interest in improvements upon his wife's real estate, neither, of course, have his creditors.[97] Agreements between husband and wife might vary the principle. If a husband improves his wife's land without any agreement for compensation, he cannot bring in a claim after her death, to be enforced either against her estate or her heirs.[98] But where a husband, borrowing money on the security of his wife's lands, lays the money out in improvements thereon, with her manifest approval, equity will relieve him from liability, for repayment of the principal, while, as a tenant by the curtesy, he would be bound to keep down the interest.[99]

Inasmuch as the husband's interests in his wife s lands is limited to the usufruct as a life-tenant, and Anglo-Saxon policy has been that landed property should descend to one's blood relations, it follows that all claims presented by him against her real estate, after her death, in relation to such property, will be closely scrutinized. Thus it has been held that he cannot claim reimbursement for moneys paid in settling controversies in regard to the title of his wife's real estate.[1] So where a husband was sued with his wife for her debt contracted before marriage, and secured by a mortgage of her land, and after her death voluntarily suffered judgment to be rendered against him for the amount of the debt, when he knew that he was not legally liable to a judgment, and paid the debt on execution, taking to himself no assignment of the mortgage, but suffering it to be discharged altogether, it is held that he cannot seek indemnity from his wife's heirs either at law or in equity, even though he had misapprehended the legal effect of his consent to the judgment.[2]

448, 25 S. W. 1106; Ketterer v. Nelson, 146 Ky. 7, 141, S. W. 409, 37 L. R. A. (N. S.) 754.

97. Liehty v. Hager, 13 Pa. St. 565; Robinson v. Huffman, 15 B. Monr. 80; Corning v. Fowler, 24 Ia. 584; Knott v. Carpenter, 3 Head, 542; Barto's Appeal, 55 Pa. St. 386.

98. Webster v. Hildreth, 33 Vt. 457.

99. Hanford v. Boekee, 5 C. E. Green, 101; Kirby v. Bruns, 45 Misc. 234.

See further, as to improvements on the wife's separate lands, *supra*, § 443a.

1. Campbell v. Wallace, 12 N. H. 362; Burleigh v. Coffin, 2 Post. 118.

2. Warren v. Jennison, 6 Gray, 559.

§ 1359. Husband's Rights of Action.

The tenant by curtesy has title which will support ejectment,[3] or he may defend an action for possession,[4] and the owners of the fee are not necessary parties to an action by the tenant by curtesy to protect his possession,[5] and he is not entitled to damages for detention of the property until after demand for possession.[6] The husband's interests as tenant by curtesy are not such a present interest as entitles him to contest the will of the wife's mother,[7] but he may be entitled to contest his wife's will;[8] but a divorced husband has ordinarily no right to contest the will of his former wife[9] even though he may have a contingent interest in her estate in case of the death of a child.[10]

At common law the husband has a right to sue in his own name for damages to his estate by curtesy initiate, as it is a vested estate. There is a peculiar doctrine in Tennessee, however, which regards the husband and wife as joint owners, and under this doctrine it is held that where the wife conveys the property without joining him he has no right to bring suit against the grantee without joining her as party plaintiff.[11] Possession by the heir does not oper-

But see 2 Story Eq. Juris., § 1023; Pitt v. Pitt, 1 Turn. & Russ. 180; Shrewsbury v. Shrewsbury, 1 Ves. Jr. 233; Jenness v. Robinson, 10 N. H. 218.

3. Hays v. Lemoine, 156 Ala. 465, 47 So. 97.

4. Maupin v. Maupin's Guardian, 33 Ky. Law Rep. 658, 110 S. W. 840 (burden is on defendant claiming curtesy to prove that life tenant had died before defendant's wife); Goss v. Spencer, 253 Pa. 363, 98 A. 616.

5. Costello v. Grand Trunk Ry. Co., 70 N. H. 403, 47 A. 265.

6. Gogan v. Burdick, 182 Ill. 126, 55 N. E. 126.

7. Teckenbrock v. McLaughlin, 246 Mo. 711, 152 S. W. 38.

8. Wells v. Butts, 45 N. Y. App. Div. 115, 61 N. Y. Supp. 231

9. *Re* Edelman, 148 Cal. 233, 82 P. 962, 113 Am. St. R. 231 (where the husband had waived his rights by articles of separation).

10. Halde v. Schultz, 17 S. D. 465, 97 N. W. 369. (If the husband has a present right in the estate there seems, however, no reason why he is not a party interested to contest.)

11. Bryant v. Freeman, 131 Tenn. 87, 173 S. W. 863, L. R. A. 1915D, 996.

ate to start the statute of limitations, since it is the duty of the heir to assign curtesy.[12]

For an injury to the wife's inheritance in lands the husband cannot sue alone, since the caues of action will not survive to him.[13] Consequently he cannot prosecute such an action after the death of the wife during the pendency of such a suit and before judgment.[14] If the husband should die first, however, the suit will not abate, as he is not the real plaintiff.[15]

§ 1360. Assignment of Curtesy.

Statutory proceedings in some States have superseded the old petition to assign curtesy,[16] but the tenant by curtesy has no right to demand a sale of the entire estate, and any statute purporting to give him such right is unconstitutional.[17]

The tenant by curtesy has the burden of proving birth of issue,[18] and has the burden of proving that he has renounced the provisions of his wife's will in his favor.[19]

In valuing curtesy the value of the timber on the land should not be deducted,[20] but the value of coal or other mineral in unopened mines should be, as a life tenant has no interest in unopened mines.[21]

12. Sill v. Sill, 185 Ill. 594, 57 N. E. 812.

13. Clapp v. Stoughton, 10 Pick. 463; Fuller v. Naugatuck R. R. Co., 21 Conn. 557; Com. Dig. Baron & Feme, V.

14. 1 Bl. Com. 443; 1 Chitty Pl. 75; Ryder v. Robinson, 2 Greenl. 127; Buck v. Goodrich, 33 Conn. 37. And see Deadrich v. Armour, 10 Humph. 588.

15. 1 Chitty Pl. 22; Little v. Downing, 37 N. H. 355; Jaques v. Short, 20 Barb. 269.

16. Landis v. Marsh, 32 Ohio Cir. Ct. R. 399.

17. Curtis v. Hiden, 84 S. E. 664.

18. Fleming v. Sexton, 172 N. C. 250, 90 S. E. 247.

19. Pearce v. Pearce, 281 Ill. 194, 118 N. E. 84.

20. Bond v. Godsey, 99 Va. 564, 39 S. E. 216.

21. Bond v. Godsey, 99 Va. 564, 39 S. E. 216.

CHAPTER II.

HOW CURTESY IS BARRED.

SECTION 1361. Sale or Devise by Wife.
1362. Mortgage.
1363. Effect of Judicial Sale.
1364. Sale of Curtesy Rights.
1365. Release.
1366. Waiver.
1367. Loss of Wife's Seisin.
1368. Divorce.
1369. Remarriage of Husband.
1370. Rights of Creditors.
1371. Imprisonment or Crime.
1372. Wife Engaging in Trade.
1373. Conveyances or Gifts in Fraud of Curtesy.

§ 1361. Sale or Devise by Wife.

At common law, where lands of the wife were converted into personalty, and sold by the joint deed and concurrence of husband and wife, the money, when collected, became the husband's;[22] and where land is sold containing unopened coal mines the tenant by the curtesy is entitled to an interest in the fund created by the sale. The fact that the mines were unopened at the death of the wife and that the tenant by the curtesy had no right to work them himself is not evidence that he had no interest in them, even though that interest was valueless until the mines were opened or sold by the owner of the fee.[23] But equity was always disposed to regard the wife's intention in such transactions, and treat proceeds as real or personal estate accordingly; and such must be more strenuously the tendency of courts under the married women's acts,[24] and such we

22. *Supra*, §§ 161, 201.

23. Deffenbaugh v. Hess, 225 Pa. 638, 74 A. 608, 36 L. R. A. (N. S.) 1099.

24. Brevard v. Jones, 50 Ala. 221; Marshall v. Gayle, 58 Ala. 284; Carpenter v. Davis, 72 Ill. 14. As to marital agreements for disposing of

may deem the usual effect of a husband's joinder with his wife, during her life, in a conveyance of her land, especially if the deed contain covenants of warranty, or a clear understanding be in some way manifested.[25]

Both husband and wife must join in a deed of land in which the husband has a right of curtesy initiate,[26] although in some States by statute the wife has a right at any time to bar curtesy by conveyance or devise.[27] The wife may convey alone a fee-simple title subject to the contingency that the husband outlives her.[28] The wife cannot bar curtesy by devising her lands to third persons,[29] except with the husband's assent,[30] or under a statute giving her the power to devise as if sole.[31]

§ 1362. Mortgage.

The joinder of a husband with his wife in a mortgage of her lands does not affect his right of curtesy except as a release in favor of the mortgagee[32] and he takes his curtesy subject to the mortgage.[33] Where the husband and wife make a mortage on her

the curtesy interest so that the wife shall have full benefit of the proceeds, see Teague v. Downs, 69 N. C. 280.

25. 1 Washb. Real Prop. 152; Stewart v. Ross, 50 Miss. 776; Carpenter v. Davis, 72 Ill. 14.

26. Clay v. Mayer, 144 Mo. 376, 46 S. W. 157; Ennis v. Eager, 152 Mo. App. 493, 133 S. W. 850; Hackensack Trust Co. v. Tracy, 86 N. J. Eq. 301, 99 A. 846; Bryant v. Freeman, 134 Tenn. 169, 183 S. W. 731.

27. Balster v. Cadick, 29 App. D. C. 405; Yung v. Blake, 148 N. Y. S. 557, 163 App. Div. 501; Pierce v. Ellis, 152 P. 340; Johnson v. Simpson, 40 Okla. 413, 139 P. 129; Irving v. Diamond, 40 Okla. 438, 139 P. 515.

28. Moseley v. Bogy, 272 Mo. 319, 198 S. W. 847.

29. Casler v. Gray, 159 Mo. 588, 60 S. W. 1032; Hackensack Trust Co. v. Tracy, 86 N. J. Eq. 301, 99 A. 846; Larkin v. Lightburne, 177 S. W. 1154; Alderson's Adm'r v. Alderson, 46 W. Va. 242, 33 S. E. 228.

30. McBride's Estate, 81 Pa. St. 303. As to operation of the wife's own will to defeat, see Clarke's Appeal, 79 Pa. St. 376.

31 Zeust v. Staffan, 16 App. D. C. 141.

32. Baker v. Baker, 167 Mass. 575, 46 N. E. 391.

33. Shannon v. Ogletree (Ala.), 76 So. 865; Banta v. Smith, 41 Ind. App. 364, 83 N. E. 1017; Ketterer v. Nelson, 146 Ky. 7, 141 S. W. 409; Hull v. Hull, 139 Tenn. 572, 202 S. W. 914.

lands as security for his debt, on foreclosure his curtesy interest should be charged first.[34] Where the wife alone signs a mortgage its foreclosure will not cut off the husband's curtesy rights[35] unless he is made a party to the foreclosure proceedings.[36] A mortgage of the wife's property avoided by reason of duress of the wife by the husband will be still effective as to his curtesy.[37]

§ 1363. Effect of Judicial Sale.

Curtesy may be barred by the participation of the husband in a judicial sale of the property,[38] or a sale under some appropriate proceedings where both spouses had created an incumbrance,[39] or may be barred by a sale in partition[40] but is not barred by a judicial sale at which he was not present where he did not at the time know of his rights.[41]

§ 1364. Sale of Curtesy Rights.

Curtesy is merely a status and not a vested right and is not separately alienable during coverture, but is a mere possibility, and not being coupled with any interest in the property cannot be

The husband's curtesy in real estate where he has joined in a mortgage of it extends only to the equity above the mortgage where the statute defines curtesy as such of the wife's interest as has not been barred. Ketterer v. Nelson, 146 Ky. 7, 141 S. W. 409, 37 L. R. A. (N. S.) 754.

34. Shields v. Yellman, 100 Ky. 655, 39 S. W. 30, 18 Ky. Law Rep. 1092.

35. Donovan v. Smith, 88 A. 167.

36. Hope v. Seaman, 119 N. Y. S. 713, judgment modified, Same v. Shevill, 122 N. Y. S. 127, 137 App. Div. 86.

37. Central Bank v. Copeland, 18 Md. 305, 81 Am. Dec. 597.

38. Brooks' Assignee v. Summers, 100 Ky. 620, 38 S. W. 1047, 18 Ky. Law Rep. 1026. See Moore v. Hemp's Ex'rs, 24 Ky. Law Rep. 121, 68 S. W. 1 (where curtesy is not mentioned it will not be barred); Craig v. Smith, 84 N. J. Eq. 593, 95 A. 194. See Wallace v. Wallace's Ex'x, 149 Ky. 636, 149 S. W. 988.

39. See Stewart v. Ross, 50 Miss. 776.

40. Frahm v. Seaman, 179 Ia. 144, 159 N. W. 206.

A partition sale should not be made without consent of the curtesy tenant. Richardson v. Trubey, 250 Ill. 577, 95 N. E. 971.

41. Dotson v. Merritt, 141 Ky. 155, 132 S. W. 181.

made the subject of mortgage or transfer.[42] In some States, however, by statute a tenant by curtesy may convey his rights,[43] but such a sale is subject to a mortgage lien.[44]

A sale by the father of land in which he had a curtesy right gives the daughter, who holds the fee, no right to any of the proceeds, since the father could not sell the fee.[45]

A sale of curtesy is subject to taxes where no representation to the contrary is made.[46]

§ 1365. Release.

A release of curtesy in a contract of separation is based upon a valid consideration and is valid,[47] and an agreement in settlement of curtesy rights is binding,[48] but usually a contract between husband and wife by which he gives up his curtesy is invalid even though she devises lands to him in reliance on it.[49] Curtesy cannot be affected by an antenuptial agreement that there shall be no curtesy.[50] The husband's conveyance of land in ignorance of an

42. Hope v. Seaman, 119 N. Y. S. 713, judgment modified, Same v. Shevill, 122 N. Y. S. 127, 137 App. Div. 86. See Johnson's Adm'x v. Gordon, 145 Ky. 421, 140 S. W. 538.

The husband's own assignment or conveyance during his life, even if not literally extinguishing his curtesy, may debar him from claiming it against persons having a superior equity. Shippen's Appeal, 80 Pa. St. 391.

43. Andrson v. Daugherty, 169 Ky. 308, 183 S. W. 545.

44. Northwestern Mutual Life Ins. Co. v. Mallory, 93 Neb. 579, 141 N. W. 190.

45. Wear & Boogher Dry-Goods Co. v. Smith, 66 Ark. 609, 49 S. W. 493.

46. Ward v. Ward, 179 S. W. 495, (although forfeited for non-payment of taxes).

47. Luttrell v. Boggs, 168 Ill. 361, 48 N. E. 171; McBreen v. McBreen, 154 Mo. 323, 55 S. W. 463, 77 Am. St. R. 758. See Williams v. Coffman, 31 Ky. Law Rep. 151, 101 S. W. 919. See *In re* Arnold's Estate, 249 Pa. 348, 94 A. 1076.

48. Sill v. Sill, 185 Ill. 594, 57 N. E. 812.

49. McCrary v. Biggers, 46 Ore. 465, 81 P. 356, 114 Am. St. R. 882.

In North Carolina, statutes permit the husband to surrender his estate as tenant by the curtesy initiate, and let it merge in the reversion of the wife, on due understanding with her. Teague v. Downs, 69 N. C. 280.

50. Kennedy v. Koopman, 166 Mo. 87, 65 S. W. 1020.

A release of curtesy contained in an antenuptial contract becomes executed by marriage and leaves the

interest which his wife had in it does not operate to release his right of dower.[51]

§ 1366. Waiver.

The husband may waive his curtesy where he ratifies his wife's will by qualifying as executor under it,[52] but he is not barred where he qualifies under his wife's will naming him as trustee of property for others where he actually keeps possession and takes rents.[53]

The right of renunciation of a will is available only in the proper tribunal of the testator's domicile. It is an incident to the jurisdiction of the tribunal which has the exclusive power to admit the will to probate and proceeds from the jurisdiction over the matter of probate.[54] Therefore, where a husband accepts the provisions made for him by his wife's will in the State of his domicile he will not be allowed to repudiate them and claim against the will in another State.[55]

Curtesy is not barred by failure to assert it until the death of life tenants under the wife's deed,[56] but where the husband signs blank deeds of his wife's property he is then estopped as against her grantee to claim courtesy.[57] The husband does not waive his distributive share in property which the wife owns by claiming his homestead rights in property which she did not own but which he erroneously thought belonged to her.[58]

husband incapable of curtesy. White v. White, 46 N. Y. S. 658, 20 Misc. 481.

51. Farrand v. Long, 184 Ill. 100, 56 N. E. 313.

52. Tiddy v. Graves, 126 N. C. 620, 36 S. E. 127; s. c., 127 N. C. 502, 37 S. E. 513 (where by statute wife's devise bars curtesy).

53. Hanneman v. Richter, 177 F. 563.

54. Slaughter v. Garland, 40 Miss. 172.

55. Lindsley v. Patterson, — Mo. —, 177 S. W. 826, L. R. A. 1915F, 680.

56. Davis v. Fenner, 30 Pa. Super. Ct. 389.

57. Manatt v. Griffith, 147 Ia. 707, 124 N. W. 753.

58. Husted v. Rollins, 156 Ia. 546, 137 N. W. 462, 42 L. R. A. (N. S.) 378.

§ 1367. Loss of Wife's Seisin.

Curtesy may be barred by loss of title by the wife by adverse possession[59] or where the statute turns the wife's fee tail into a life estate.[60]

§ 1368. Divorce.

A divorce generally terminates curtesy rights[61] even where the wife has been divorced for her own fault[62] and especially where granted for desertion by the husband,[63] and a decree of separation has the same effect as to lands subsequently acquired by the wife although it does not affect his curtesy in lands belonging to her at the time of the decree.[64] Where the husband by stipulation in a divorce decree agrees to give up his curtesy on demand and she dies without making demand her heirs cannot insist on the release.[65] If the husband conveys his curtesy interest and thereafter the wife

59. *Where a married woman conveys* her separate interest in real estate by deed void as not joined by her husband she is under no disability to sue for the disseisin. She is barred by the adverse possession of her grantee for the statutory period as her void deed is color of title, and, therefore, the husband has no right after her death to recover his curtesy interest as the husband has no interest during her life, and to entitle him to curtesy in her land on her death she must have died seised of an estate of inheritance. During coverture a husband has no interest in the separate estate of his wife and as she lost all interest in the land during her life by adverse possession he has no curtesy. Calvert v. Murphy, 73 W. Va. 731, 81 S. E. 403, 52 L. R. A. (N. S.) 534.

60. Spencer v. O'Neill, 100 Mo. 49, 12 S. W. 1054.

61. See Koltenback v. Cracraft, 36 Ohio St. 584; Campbell v. Switzer, 74 W. Va. 509, 82 S. E. 319 (although husband was justified in leaving wife).

62. Doyle v. Rolwing, 165 Mo. 231, 65 S. W. 315, 55 L. R. A. 332, 88 Am. St. R. 416.

Although divorce due to the fault of the husband will bar his curtesy, still, where his separation is justified, curtesy will not be barred. Weller v. Weller, 213 Pa. 265, 62 A. 859; *In re* Hayes' Estate, 23 Pa. Super. Ct. 570.

63. Stock v. Mitchell, 252 Ill. 530, 96 N. E. 1076; *In re* Kvist's Estate, 256 Pa. 30, 100 A. 523; Shumate v. Shumate, 78 W. Va. 576, 90 S. E. 824.

64. Hartigan v. Hartigan, 65 W. Va. 471, 64 S. E. 726.

65. Shannon v. Watt, 87 N. J. Eq. 142, 99 A. 114.

obtains a divorce from him this does not entitle her to full title against the grantee of the husband.[66]

§ 1369. Remarriage of Husband.

As the tenant by curtesy does not hold his estate as widower but as husband the estate continues upon his remarriage.[67]

§ 1370. Rights of Creditors.

Creditors of Wife.— The tenant by curtesy takes his estate subject to his wife's debts in some States[68] and subject to lien debts only in others,[69] while in other States the curtesy interest is after the death of the wife superior to the rights of the wife's creditors although her land might have been taken on execution during her life.[70]

Creditors of Husband.— At common law after issue born a husband was seised in his own right of a life estate which was vendible and subject to sale for his debts even during his wife's life,[71] but in this country a husband's curtesy right is not usually subject to the payment of his debts during the life of his wife,[72] but after the death of the wife the curtesy interest may be taken

66. Aiken v. Suttle, 72 Tenn. (4 Lea), 103.

67. Clay v. Edwards, 84 N. J. Law, 221, 86 A. 548.

68. *In re* Bidgood's Estate, 86 Vt. 295, 85 A. 6; Wilder's Ex'x v. Wilder, 82 Vt. 123, 72 A. 203 (duty to pay interest on mortgage); Campbell v. Martin, 95 A. 494; Bennett v. Camp (Vt. 1882), 54 Vt. 36; Schmidt v. Raymond, 148 Wis. 271, 134 N. W. 362.

69. Voss v. Stortz, 177 Ky. 541, 197 S. W. 964; Gilkison v. Gore, 79 W. Va. 549, 91 S. E. 395.

70. Hampton v. Cook, 64 Ark. 353, 42 S. W. 535, 62 Am. St. R. 194; Shuey v. Lambert, 53 Ind. App. 567, 102 N. E. 150; *contra*, Shaddinger v. Fisher, 3 Ohio Cir. Ct. R. 656, 2 O. C. D. 381.

71. Teckenbrock v. McLaughlin, 246 Mo. 711, 152 S. W. 38.

72. Campbell v. Campbell's, 79 Ky. 395, 3 Ky. Law Rep. 15.

Curtesy initiate is not liable to attachment by a creditor of the husband under a statute preserving curtesy, but keeping the real estate of married women free from liability for the debts or contracts of the husband. Carroll v. Sanford, 34 R. I. 337, 83 A. 855, 40 L. R. A. (N. S.) 1204.

by creditors although it has not been assigned[73] and his indebtedness to his wife's estate may be charged against his curtesy.[74]

§ 1371. Imprisonment or Crime.

Curtesy may be lost by the imprisonment of the husband under a statute providing that such imprisonment renders the person civilly dead.[75] Where the statute expressly makes the husband the heir of the wife, the court has no authority to make an exception against the husband who murders the wife, especially where there is no evidence that the murder is committed in order to obtain her property.[76] The remedy is for the legislature and not for the court. Such act of the court would contravene constitutional provisions that no conviction shall work a corruption of blood or forfeiture of estate.[77]

§ 1372. Wife Engaging in Trade.

Curtesy may be barred by a married woman's trade certificate on account of the drunkenness of the husband.[78]

§ 1373. Conveyances or Gifts in Fraud of Curtesy.

At common law it was not possible in a grant to a married woman of an estate of inheritance to exclude her husband from his right of curtesy,[79] so there is a doctrine that any acts or convey-

73. Studebaker Bros. Mfg. Co. v. De Moss, 111 N. E. 26; Gildehaus v. Fidelity Building & Savings Co., 24 Ohio Cir. Ct. R. 110.

As to the right of a judgment creditor, after the wife's death, to reach the husband's interest, or an issue of fraud, see Cutris v. Fox, 47 N. Y. 299. Cf. Frazer v. Hightower, 12 Heisk. 94.

74. Richardson v. Trubey, 240 Ill. 476, 88 N. E. 1008.

75. Glielmi v. Glielmi, 131 N. Y. S. 373, 72 Misc. 511.

76. Holloway v. McCormick, 41 Okla. 1, 136 P. 111, 50 L. R. A. (N. S.) 536; McAllister v. Fair, 72 Kan. 540, 84 P. 112, 3 L. R. A. (N. S.) 726, 115 Am. St. R. 233, 7 Ann. Cas. 973.

77. Holloway v. McCormick, 41 Okla. 1, 136 P. 111, 50 L. R. A. (N. S.) 536.

78. *In re* Browarsky's Estate, 252 Pa. 35, 97 A. 91.

79. Chapman v. Price, 83 Va. 392, 11 S. E. 879.

ances manifestly intended to defraud the husband of his curtesy will be avoided and the curtesy interest protected, even where the wife conveys in fraud of curtesy in anticipation of marriage.[80]

But it is not fraudulent for a married woman in buying property to take title in the name of another even though done to exclude him from his curtesy rights.[81] The husband's rights have also been protected against gifts *causa mortis*,[82] but a statute simply providing that the husband shall have curtesy in the wife's personalty on her death leaves his curtesy subject to the rights of a donee under a gift of personalty *causa mortis*.[83]

80. A fraud perpetrated by an intended wife, in conveying her lands to others, cannot deprive the husband of his marital rights of curtesy. Robinson v. Buck, 71 Pa. St. 386.

81. Brennaman v. Schell, 212 Ill. 356, 72 N. E. 412.

82. Baker v. Smith, 66 N. H. 422, 23 A. 82.

83. Bosburg v. Mallory, — Ia. —, 135 N. W. 577.

CHAPTER III.

NATURE OF DOWER.

SECTION 1374. Dower in General — Dower and Curtesy Compared.
1375. Origin and Nature of the Widow's Dower.
1376. Effect of Dower Interest in Keeping Estate Open.

§ 1374. Dower in General — Dower and Curtesy Compared.

While marriage impresses at once, at common law, the personal property of the wife with a new title — namely, that of her husband — the personal property of the husband remains unaffected thereby. He may buy, sell, and dispose of his own goods and chattels after marriage as before, without let or hindrance from his wife. She cannot be said to acquire a title to his general personal property, actual or potential (independently of a gift or settlement), until her coverture has terminated. Then her rights are rather those of a widow than of a wife. But as to the husband's real estate, which in old times was the only property regarded at law as really of much consequence, the rule has always been otherwise. The husband's possible life interest attached to the wife's lands whenever acquired by her; the wife's possible life interest to the husband's lands whenever acquired by him. The husband's estate was known as curtesy, the wife's as dower. These estates had not, perhaps, the same origin: they certainly had not, in all respects, the same incidents; but both rights were known in England from a very early period, and both have remained with very little change down to a recent date in England and America.

Each estate is in the nature of a possible encumbrance, and conveyancers seek to get rid of it whenever the owner of lands wishes to pass the title in fee to another. Dower, to be sure, gave the widow only a life interest to the extent of one-third, while curtesy gave the surviving husband the full life interest. But on

the other hand, dower became absolute in the widow when she outlived her husband, while curtesy, as we have seen, never attached at all unless the husband outlived his wife and was fortunate enough to have had a child by her besides. So that in these respects the rights of husband and wife, on the whole, if not equivalent, were nearly so. And as the reader may have already inferred, the general rule as to descent of real estate has been that, subject to the widow's dower, the lands of a husband descend to his own heirs; while subject to the surviving husband's curtesy, the lands of a wife descend to her own heirs; our policy being to preserve real estate in the family, so to speak, of the respective parties to a marriage, in default of issue capable of inheriting from both.[84]

§ 1375. Origin and Nature of the Widow's Dower.

Dower has been defined as that provision which the law makes for a widow out of the lands or tenements of her husband.[85] Its real basis is the common law of England, as modified by statute.[86]

84. See 1 Washb. Real Prop. 127, 147; Jenks v. Langdon, 21 Ohio St. 362; Howard v. Strode, 242 Mo. 210, 146 S. W. 792, 799.

85. Co. Litt. 30 *a;* 2 Bl. Com. 130; 1 Washb. Real Prop. 146.

An inchoate right of dower is a kind of property, with incidents *sui generis;* it is more than a possibility, and may be denominated a contingent interest, and it is an incumbrance upon land, protected by the courts during coverture. Fitcher v. Griffiths, 216 Mass. 174, 103 N. E. 471.

In North Carolina dower has been defined as the statutory provision made for the widow out of the estate of the husband, as part of the intestate laws of the State, and is not a result of the contract of marriage. Corporation Commission v. Dunn, 174 N. C. 679, 94 S. E. 481.

"Dower" ordinarily means the interest which the law gives to a widow in the lands of her deceased husband, and has no application to the relation of parent and child. Middleworth v. Ordway, 191 N. Y. 404, 84 N. E. 291.

Dower is an interest in land of which the husband is seised during coverture, arising in favor of the wife upon the consummation of marriage and the seisin of the husband. Elder v. McIntosh, 88 S. C. 286, 70 S. E. 807; Vantage Mining Co. v. Baker, 170 Mo. App. 457, 155 S. W. 466; Hilton v. Sloan, 37 Utah, 359, 108 P. 689.

86. Bryon v. Bryon, 134 App. Div. 320, 119 N. Y. S. 41.

In its technical sense the word relates to real estate only. It is said to be given for her support and the nurture of her children; but it applies, in fact, whenever she is the survivor, without reference to her actual circumstances as to means of support or the burden of a family. Dower extends to all estates of inheritance which the husband has held at any period of the coverture in his own right, and which any issue of hers might, if born, possibly inherit.

The word dower is of ancient origin, and seems to come from the word *dos* at the civil law, which, however, signified something quite different, and more nearly approaching what we express by the term dowry. Whether the custom of dower was introduced into England by the Saxons, or came over with the Normans, is a disputed question; but it was clearly established at or before the reign of Henry III. An early writer remarks that "tenant in dower is so much favored as that it is the common byword of the law that the law favoreth three things: life, liberty, dower." [87] But these three things do not seem to have kept an equal pace in the march of civilization.

There were various kinds of dower at the English law, one only of which — namely, dower at common law — is in use in this country. Dower at common law extends to one-third of the husband's real estate, and is often known as the "widow's thirds," [88] though of course inapplicable in this sense to her distributive share of personal property. Ancient customs varied the proportion somewhat in England; thus gavelkind gave one-half instead of one-third, and was limited to widowhood. The other species of dower were abolished by statute in England in the time of

87. Bac. Law Tracts, 331. See 1 Washb. Real Prop. 147; Wright Ten. 191; Co. 2d Inst. 16; 2 Bl. Com. 129; 1 Cruise Dig. 152; Donaldson v. Donaldson, 249 Mo. 228, 155 S. W. 791; Shannon v. Watt, 87 N. J. Eq. 142, 99 A. 114; Rumsey v. Sullivan, 166 App. Div. 246, 150 N. Y. S. 287; Fuller v. Conrad's Adm'r, 94 Va. 233, 26 S. E. 575; Wachstetter v. Johnson (Ind.), 108 N. E. 624, 990.

88. Dow v. Dow, 36 Mo. 211; 1 Washb. Real Prop. 149. But, under some of our modern statutes, courts

Charles II., after having previously fallen into general disuse.[89]

There is much controversy as to whether the wife's interest before the death of her husband is an interest in land or whether it is simply an inchoate right of action.[90]

§ 1376. Effect of Dower Interest in Keeping Estate Open.

The existence of a dower interest is enough to keep an estate open so that an administrator *de bonis* may be appointed and so that the heirs are not barred even after a long lapse of time in asking for one.[91]

apply the term with less precision in this respect. Padfied v. Padfield, 78 Ill. 16; Mitchell v. Word, 64 Ga. 208.

89. Stat. 12 Car. II., ch. 24. See 1 Washb. Real Prop. 149, and 2 Bl. Com. 133, as to these ancient kinds of dower; dower *ad ostium ecclesiæ*, dower *ex assensu patris*, and dower *de la plus belle*.

90. See 28 Harvard Law Review, 615; Baum v. Baum, 109 Wis. 47, 85 N. W. 122, 83 Am. St. R. 854, 53 L. R. A. 650.

91. McCranie v. Hutchison, 139 Ga. 792, 77 S. E. 1064, 45 L. R. A. (N. S.) 1073.

CHAPTER IV.

ESSENTIALS OF DOWER.

SECTION 1377. Essentials of Dower.
1378. Marriage.
1379. Rights of Divorced Wife.
1380. The Essential of Seisin in the Husband.
1381. The Husband's Seisin in Trust Property, etc.
1382. The Husband's Seisin; Subject Continued.

§ 1377. Essentials of Dower.

The three essentials of dower nearly correspond with those of curtesy: birth of issue, as we have said, not being requisite. They are marriage, seisin of the husband, and his death. But a careful comparison of the two estates at the old law shows some inequalities: thus, while the husband might have curtesy in the wife's trust property, the wife could not claim dower from that of her husband. This injustice grew out of an apparent necessity: it was remedied in England by the late dower act, and apparently never had a firm foothold in the United States.[92]

§ 1378. Marriage.

A claim for dower depends on a valid marriage and a void marriage although honestly entered into will not suffice[93] and even a common-law marriage may be sufficient[94] and the wife claiming

92. Dennis v. Harris, 179 Ia. 121, 153 N. W. 343; Bates v. Meade, 174 Ky. 545, 192 S. W. 666; McIlvain v. Scheibley, 109 Ky. 455, 22 Ky. Law Rep. 942, 59 S. W. 498; Murray v. Scully, 259 Mo. 57, 167 S. W. 1017; Tckenbrock v. McLaughlin, 246 Mo. 711, 152 S. W. 38; Rumsey v. Sullivan, 166 App. Div. 246, 150 N. Y. S. 287; Smith v. Doe, 111 N. Y. S. 525; Raleigh v. Wells, 29 Utah, 217, 81 P. 908, 110 Am. St. R. 689, 1 Washb. Real Prop. 163, and cases cited; Stat. 3 & 4 Will. IV., ch. 105, *post*.

93. Huffman v. Huffman, 51 Ind. App. 330, 99 N. E. 769 (marriage void for insanity).

94. Lavery v. Hutchinson, 249 Ill. 86, 94 N. E. 6.

dower has a burden of establishing a valid marriage.[95] Where parties marry in good faith and live together as husband and wife and by their joint efforts accumulate property the wife will be entitled to share in it although it is in the name of the husband on his death, although the marriage was void as entered into within the time after the husband had obtained a divorce during which marriage is prohibited.[96]

A devise by a man to his assumed wife is not void simply because it appears that her marriage to him was void as made within the prohibited period after her divorce where the parties had lived together for some years as man and wife and that the testator thought the devisee was his lawful wife. Here it is clear whom the testator intended as the object of his bounty and it did not appear that the devise was obtained by any fraud on the part of the devisee.[97]

§ 1379. Rights of Divorced Wife.

A statute declaratory of the common law as to dower and allowing this right to a widow may include a divorced woman as the word "widow" is comprehensively employed to designate the person entitled to dower. The right to dower is not dependent on the woman being the wife at the time of her husband's decease.

Where the wife obtains a divorce in another State on grounds not recognized in the State where the lands lie the general policy of the law in the State where the lands lie will govern and the wife preserves her dower in lands owned by him during their marriage. The divorced wife has no dower in lands acquired by the husband after the divorce.[98]

95. Hilton v. Snyder, 37 Utah, 384, 108 P. 698. See Clarkson v. Washington, 38 Okla. 4, 131 P. 935. See, however, Roessle v. Roessle, 163 App. Div. 344, 148 N. Y. S. 659.

96. *Re* Brenchley, 96 Wash. 223, 164 P. 913, L. R. A. 1917E, 968.

97. McDole v. Thurm, 276 Ill. 200, 114 N. E. 542, L. R. A. 1917B, 1150.

98. Van Blaricum v. Larson, 205 N. Y. 355, 98 N. E. 488, 41 L. R. A. (N. S.) 219.

§ 1380. The Essential of Seisin in the Husband.

The only essential of dower which calls for especial notice is the second; for we have elsewhere considered what constitutes a marriage; and as to the death of a husband leaving a widow surviving, it need only be remarked that, recognizing that legal presumption of death which arises from one's absence for seven years without being heard from, our courts sometimes allow dower where the fact of the husband's death cannot be positively established.[99] What, then, is that seisin of the husband which entitles his widow to dower in the premises at the common law?

Briefly, then, bearing in mind that the husband's inheritance must have been his during the particular marriage, dower does not attach to a mere reversion or remainder expectant upon a freehold in another so long as that freehold remains outstanding. And no more could curtesy; the freehold must terminate during marriage in order that there be a sufficient seisin in the husband to support the dower interest; in other words, his estate of inheritance must become a vested, not remain an expectant right;[1] even though

99. Sherod v. Ewell, 104 Ia. 253, 73 N. W. 493; Foulks v. Rhea, 7 Bush (Ky.), 568; *In re* McKinley's Estate, 66 Misc. 126, 122 N. Y. S. 807; Baker v. Fidelity Title & Trust Co., 55 Pa. Super. 15.

1. Ward v. Ward, 145 F. 1023, 74 C. C. A. 146; Talty v. Talty, 40 App. D. C. 587; Kirkpatrick v. Kirkpatrick, 197 Ill. 144, 64 N. E. 267; Henkins v. Henkins, — Ill. —, 122 N. E. 88; Case v. Collins, 37 Ind. App. 491; 76 N. E. 781 Baker v. Syritt, 147 Ia. 49, 125 N. W. 998; Osborn v. Osborn, 102 Kan. 890, 172 P. 23; Brady v. Brady, 158 Ky. 541, 165 S. W. 655; Dixon v. Harris, 32 Ky. Law Rep. 275, 105 S. W. 451; Baker v. Baker, 167 Mass. 575, 46 N. E. 391; Gray v. Whittemore, 192 Mass. 367, 78 N. E. 422, 10 L. R. A. 1143, 116 Am. St. R. 246; Walden v. Walden, 213 Mass. 418, 100 N. E. 649; Whitman v. Huefner, 221 Mass. 265, 108 N. E. 1054; Shriver v. Shriver, 127 Md. 486, 96 A. 615; Von Arb v. Thomas, 163 Mo. 33, 63 S. W. 94; Gilmore v. Sellars, 145 N. C. 283, 59 S. E. 73; Thomas v. Bunch, 158 N. C. 175, 73 S. E. 899; Cummings v. Cummings, 76 N. J. Eq. 568, 75 A. 210; Russell v. Wales, 119 App. Div. 536, 104 N. Y. S. 143; Jackson v. Walters, 86 App. Div. 470, 83 N. Y. S. 696; Stewart v. Crysler, 52 App. Div. 597, 65 N. Y. S. 483; Tredwell v. Tredwell, 148 N. Y. S. 391, 86 Misc. 104; Barr v. Howell, 147 N. Y. S. 483, 85 Misc. 330; *In re* Faile, 100 N. Y. S. 856,

the remainder-man be in possession of the estate,[2] the husband's inheritance must have been an entire one. But, on familiar principles of real-estate law, the intermediate estate being less than a freehold, as a mere lease for years, a seisin of the reversion or remainder in fee will suffice.[3] A merger of estates so as to unite the inheritance in the husband gives dower;[4] so dower can be claimed in the estate of a tenant in common, though not, of course, in the estate of one joint-tenant who leaves another surviving him;[5] even to exhaustion in mines owned by the husband which had been opened during his lifetime.[6] Since equity impresses

51 Misc. 166; Johnson v. Johnson, 93 N. Y. S. 197, 46 Misc. 314; Parthe v. Parthe, 6 Ohio App. 317; Sammis v. Sammis, 23 R. I. 499, 51 A. 105.

A wife takes no dower in land devised to her husband subject to executory limitations. Sheffield v. Cooke, 39 R. I. 217, 98 A. 161; Rhode Island Hospital Trust Co. v. Harris, 20 R. I. 408, 39 A. 750; 1 Washb. Real Prop. 154, and American cases cited; 4 Kent Com. 39; Eldredge v. Forrestal, 7 Mass. 253; Apple v. Apple, 1 Head (Tenn.), 348; Whitman v. Whitney, 228 Mass. 18, 116 N. E. 893.

2. Redding v. Vogt, 140 N. C. 562, 53 S. E. 337.

3. 1 Ld. Raym. 326; Hitchens v. Hitchens, 2 Vern. 403.

4. And where a tenant in common buys in the estate of his cotenant. Barton v. Wilson, 172 S. W. 1032.

As where the life tenant releases his estate to the remainderman. Ferguson v. Ferguson, 153 Ky. 742, 156 S. W. 413; Miller v. Tulley, 48 Mo. 503.

5. Vaughn v. Vaughn, 180 Ala. 212, 60 So. 872; Helmken v. Meyer, 138 Ga. 457, 75 S. E. 586; Wachstetter v. Johnson (Ind.), 108 N. E. 624, 990; Bloom v. Sawyer, 121 Ky. 308, 89 S. W. 204, 28 Ky. Law Rep. 349; Coffin v. Coffin, 4 Dane Abr. (Mass.) 674; Dudley v. Tyson, 167 N. C. 67, 82 S. E. 1025; Bell v. Golding, 136 N. Y. S. 278, 151 App. Div. 945; Richards v. Richards, 33 Ohio Cir. Ct. 640; Stewart v. Tennant, 52 W. Va. 559, 44 S. E. 223; Craig v. Smith, 84 N. J. Eq. 593, 95 A. 194; Ross v. Wilson, 58 Ga. 249. In States where the principle of survivorship among joint tenants is abolished, a wife may be endowed. Weir v. Tate, 4 Ired. Eq. 264; Reed v. Kennedy, 2 Strobh. 67; 1 Washb. 157, 158; Lee v. Lindell, 22 Mo. 202. Formerly devices to prevent dower from attaching were used by English conveyancers under the rule of joint-tenancy.

6. The rule that, where a valid mining lease has been made by a husband, his widow is entitled to dower in the royalties, applies only in the event the royalties are paid on minerals mined from the land of which she is endowed, and where any coal is mined in the future she may present her claim in an action therefor. Daniels v. Charles, 154 Ky. 232, 157 S. W. 32; Billings v. Taylor, 10 Pick.

land with the fictitious character of personalty, upon consideration of the actual circumstances attending its purchase and the purpose for which it is held, it is not always easy to say whether a widow can claim dower in partnership lands.[7] Dower in such lands cannot be claimed until the partnership debts have been paid,[8] and until equitable claims between the partners have been adjusted.[9] After such payment the proceeds may be treated as real estate to which dower will attach.[10] As to lands given or taken in exchange during her husband's lifetime, the exchange being of obviously equal interests, the rule is not quite clear, though it would seem that the widow will be put to her election between the parcels.[11]

§ 1381. The Husband's Seisin in Trust Property, etc.

Of the earlier and later rule concerning the wife's right of dower in her husband's trust property we have just spoken; and although that right is now very generally recognized in England and America, it is doubtless only coextensive with the husband's beneficial interest in the land; the rule could not possibly give the widow of a trustee dower in land held by him merely as such and for others without sanctioning robbery of the beneficiaries.[12]

(Mass.) 460; Lenfers v. Henke, 73 Ill. 405; Moore v. Collins, 45 Me. 493.

7. Hadley v. Hadley, 73 Ore. 179, 144 P. 80; Story Partn., §§ 92, 93; 1 Washb. 159, 160; Park Dow. 106; Hawley v. James, 5 Paige, 451; Smith v. Smith, 5 Ves. 189; Willet v. Brown, 65 Mo. 138; Simpson v. Leach, 86 Ill. 286.

Dower is not affected by a partnership formed to develop land of which the husband was seized prior to the formation of the partnership. Chase v. Angell, 148 Mich. 1, 108 N. W. 1105.

8. *In re* Perlhefter, 177 F. 299; Welch v. McKenzie, 66 Ark. 251, 50 S. W. 505; Ferris v. Van Ingen, 110 Ga. 102, 35 S. E. 347; Ellis v. Johnson, 4 Ky. Law Rep. 991; Sleeth v. Taylor, — W. Va. —, 95 S. E. 597.

9. Bennett v. Bennett, 137 Ky. 17, 121 S. W. 495; Davidson v. Richmond, 24 Ky. Law Rep. 699, 69 S. W. 794; Hauptmann v. Hauptmann, 86 N. Y. S. 427, 91 App. Div. 197.

10. Long v. Watts, 7 Ky. Law Rep. 375.

11. 1 Washb. 158; Mosher v. Mosher, 32 Me. 412; Stevens v. Smith, 4 J. J. Marsh. 64; De Witt v. De Witt, 202 Pa. 255, 51 A. 987.

12. Where a husband's lands have been relieved of a mortgage by his administrator in the belief that the estate was solvent, and dower therein has been assigned to the widow, she

Dower in trust property, at the present day, is most frequently considered with reference to the foreclosure of mortgages; and here a court of equity applies a most liberal rule: for while the widow of the mortgagee cannot claim dower in the mortgaged premises until after foreclosure,[13] and although the widow of a mortgagor was not dowable in his equity of redemption at common law,[14] the mortgagor's widow not only has every reasonable facility

must, where the estate is insolvent, pay her proportionate part of the money used to pay off the mortgage in order to retain her dower. Salinger v. Black, 68 Ark. 449, 60 S. W. 229.

A wife has no dower in property the naked legal title to which is conveyed to the husband in trust for her. Barker v. Smiley, 218 Ill. 68, 75 N. E. 787. The rule has been applied to a case where land paid for by the separate estate of a first wife was conveyed to the husband by mistake, the husband holding it in trust for her heirs as against the dower claim of the second wife. Hendren v. Hendren, 153 N. C. 505, 69 S. E. 506. See Gritten v. Dickerson, 202 Ill. 372, 66 N. E. 1090; Sanford v. Sanford, 157 Ill. App. 350; Johnston v. Jickling, 141 Ia. 444, 119 N. W. 746; *In re* Stude's Estate, 179 Ia. 785, 162 N. W. 10; Tevis v. Steele 47 B. Monr. (Ky.) 339; Gray's Adm'x v. Gray, 144 Ky. 603, 139 S. W. 838; Allard v. Allard, 27 Ky. Law Rep. 750, 86 S. W. 679; Miller v. Miller, 148 Mo. 113, 49 S. W. 852; Kaphan v. Toney (Tenn. Ch.), 58 S. W. 909; Wilson v. Wilson, 32 Utah, 169, 89 P. 643; Kager v. Brenneman, 62 N. Y. S. 339, 47 App. Div. 63, 30 Civ. Proc. R. 168. See Hill Trustees, 269; Cooper v. Whitney, 3 Hill (N. Y.), 97; Bartlett v. Gouge, 5 B. Monr. (Ky.) 152; Brooks v. Everett, 13 Allen (Mass.), 458; Waller v. Waller, 33 Gratt. (Va.) 83.

13. 1 Washb. Real Prop. 163. Foreclosure by the grantee or assignee of the mortgagee does not entitle the mortgagee's wife to dower. Foster v. Dwinel, 49 Me. 44. Nor can a mortgagee's wife claim dower under illegal foreclosure proceedings which were afterwards set aside, for the husband had no beneficial ownership. Waller v. Waller, 33 Gratt. 83. A wife has no dower in lands of a husband conveyed before marriage in fraud of his creditors, even though the creditors had the conveyance set aside during coverture. Gross v. Lange, 70 Mo. 45. Here the husband never had a beneficial title during marriage. But *aliter*, according to the better opinion, where his conveyance before marriage can be successfully assailed as in fraud of her marital right of dower. *Supra*, § 506; 1 Washb. 174. And in general where the husband seeks fraudulently to defeat his wife's dower interest without her knowledge or assent. Jenney v. Jenney, 24 Vt. 324; Nye v. Patterson, 35 Mich. 415; Gilson v. Hutchinson, 120 Mass. 27.

14. Harris v. Powers, 129 Ga. 74,

afforded her for discharging the encumbrances upon her husband's death whenever it may enure to her advantage to do so, but may claim dower in the equity of redemption at all events, whether the mortgage was executed before or after marriage, and upon foreclosure and sale of the premises for breach of condition have her interest protected in the distribution of the proceeds.[15] Where she

58 S. E. 1038; Powers v. Harris, *Id.;* Nolan v. Same, *Id.;* Lohmeyer v. Durbin, 206 Ill. 574, 69 N. E. 523; Virgin v. Virgin, 91 Ill. App. 188 (aff'd., 189 Ill. 144, 59 N. E. 586); May v. Fletcher, 40 Ind. 575; McMahon v. Kimball, 3 Blackf. (Ind.) 1; Snow v. Stevens, 15 Mass. 278.

15. 1 Washb. Real Prop. 164, 165; 4 Kent Com. 43, 46; Curren v. Driver, 33 Ind. 480; Sargeant v. Fuller, 105 Mass. 119; Pickett v. Buckner, 45 Miss. 226; Hart v. Logan, 49 Misc. 47 Irvine v. Armistead, 46 Ala. 363; Peckham v. Hadwen, 8 R. I. 160; State Bank v. Hinton, 21 Ohio St. 509.

As to several mortgages in some of which the wife has not released dower, and the manner of rendering decree in such foreclosure, see Sheldon v. Patterson, 55 Ill. 507. Dower has been allowed in case of a land patent. Johnson v. Parcels, 48 Mis. 549. As a general rule the law of the United States conforms in this respect to that of England under the Dower Act of 3 & 4 Wm. IV., *infra*, § 1383. Where the wife never legally released dower under the mortgage, she should have dower of the premises. Davis v. McDonald, 42 Ga. 205. Though this may be affected by local statutes giving dower only in lands of which the husband died seised. 1 Washb. 198, 202. But where, as is now usual, she joins in the mortgage after due form, whether a mortgage back for purchase-money or not, her dower is in the equity or the surplus proceeds after a foreclosure, and no more. Glenn v. Clark, 53 Md. 580; Van Doren v. Dickerson, 33 N. J. Eq. 388; Thompson v. Lyman, 28 Wis. 266. Dower is not to be favored where detracting from the security which the wife had joined in giving. Hoppin v. Hoppin, 96 Ill. 265; Johnson v. Van Velsor, 43 Mich. 208. Buying an estate subject to a mortgage, and assuming its payment, confers no dower right against the mortgagee. Kemerer v. Bournes, 53 Ia. 172.

In some States the common-law rule is followed, and a wife is not dowable of an equity of redemption or other equitable estates. In others, like Maryland, New York, Kentucky, North Carolina, Iowa, and Tennessee, the statute makes the wife dowable if the husband held the equitable estate at his death. 1 Washb. 163, 4th ed., and cases cited; Glenn v. Clark, 53 Md. 580; Abbott v. Bosworth, 36 Ohio St. 605.

As to dower right in surplus over one mortgage, where the proceeds of the sale were not sufficient to discharge both mortgages, see English case of Dawson v. Whitehaven, L. R. 6 Ch. D. 218. The widow of a grantor may have dower in premises

elects to redeem she cannot be held for a deficiency judgment against her husband on foreclosure.[16] In some States a widow is entitled to have the mortgage paid out of the husband's personal estate.[17] Where the mortgage is so satisfied, dower attaches to the whole of the land.[18] A wife cannot claim dower as against a pur-

conveyed under a deed absolute on its face, but in fact a mortgage. Turbeville v. Gibson, 5 Heisk. 565. But not in land levied and sold under execution against the husband long before his death, though the sheriff failed to make a formal deed to the purchaser. Rose v. Rose, 6 Heisk. 533. Seisin is insufficient as against owner of land, in an entry under a parol contract of purchase, no purchase-money having been paid. Latham v. McLain, 64 Ga. 320; Wooten v. Vaughn, — Ala. —, 81 So. 660; Less v. Less, 131 Ark. 232, 199 S. W. 85; Murphy v. Booker, — Ark. —, 214 S. W. 63; Mayo v. Arkansas Valley Trust Co., 132 Ark. 64, 200 S. W. 505; Davis v. Kelly, 179 Ind. 13, 97 N. E. 336; Wachstetter v. Johnson (Ind.), 108 N. E. 624, 990; Ward v. Tuttle, 54 Ind. App. 674, 102 N. E. 405, affirming judgment on rehearing 100 N. E. 761; Bolton v. Ballard, 13 Mass. 227; Hildreth v. Jones, 13 Mass. 525; Snow v. Stevens, 15 Mass. 278; Barker v. Barker, 17 Mass. 564; Bird v. Gardner, 10 Mass. 364, 6 Am. Dec. 137; Gibson v. Crehore, 5 Pick. (Mass.) 146; Eaton v. Simonds, 14 Pick. (Mass.) 98; Brown v. Lapham, 3 Cush. (Mass.) 551; McCabe v. Bellows, 7 Gray (Mass.), 148, 66 Am. Dec. 467 (explaining); Van Vronker v. Eastman, 7 Metc. (Mass.) 157; Smith v. Stephens, 164 Mo. 415, 64 S. W. 260; Wild v. Storz Brewing Co., 77 Neb. 94, 108 N. W. 145; Overton v. Hinton, 123 N. C. 1, 31 S. E. 285; Merselis v. Van Riper, 55 N. J. Eq. 618, 38 A. 196; Lugar v. Lugar, 160 App. Div. 807, 146 N. Y. S. 37; Sprague v. Law, 8 O. C. D. 428; Stochr v. Moerlein Brewing Co., 27 Ohio Cir. Ct. 330; Mowry v. Mowry, 24 R. I. 565, 54 A. 383; Sleeth v. Taylor, — W. Va. —, 95 S. E. 597. See McDonald v. McDonald, 120 Ga. 403, 47 S. E. 918; Williams v. Williams, 270 Ill. 552, 110 N. E. 876; Bowden v. Hadley, 138 Ia. 711, 116 N. W. 689; Capital Circle, No. 11, Brotherhood of the Union, v. Schmitt, 84 N. J. Eq. 95, 92 A. 596; Griffith v. Griffith, 74 Ore. 225, 145 P. 270.

16. Mackenna v. Fidelity Trust Co. of Buffalo, 184 N. Y. 411, 77 N. E. 721, 3 L. R. A. 1068, 112 Am. St. R. 620.

17. Dalton v. Dalton, 178 Ia. 508, 159 N. W. 992; *In re* Dalton's Estate, 178 Ia. 508, 168 N. W. 332; Commercial Banking & Trust Co. v. Dudley, 76 W. Va. 332, 86 S. E. 307.

18. In Iowa it has been held that where a husband purchased certain real property, assuming a mortgage his widow was entitled to have her one-third, including the homestead, set off to her free from the mortgage, if the remainder of the property was sufficient to pay the same. Haynes v. Rolstin, 164 Ia. 180, 145 N. W. 336.

chase money mortgage,[19] even though she does not sign it,[20] nor against a vendor's lien.[21]

Dower is sometimes allowed, too, out of money, the proceeds of a judicial sale or appropriation of real estate, instead of from the lands;[22] or, in the case of a mortgage foreclosure, out of the surplus accruing in the deceased mortgagor's right;[23] or, in various

Where on purchasing land a husband paid the encumbrance and deducted the amount so paid from the purchase price, it was held that the wife's dower was superior to the assignee of the mortgage because the payment extinguished it. James v. Upton, 96 Va. 296, 31 S. E. 255; Snyder v. Richey, 150 Ia. 737, 130 N. W. 922.

See Casteel v. Potter, 176 Mo. 76, 75 S. W. 597; Hoy v. Varner, 100 Va. 600, 42 S. E. 690.

19. Underground Electric Rys. Co. of London v. Owsley, 196 F. 278; Gibson v. Brown, 214 Ill. 330, 73 N. E. 578; Frederick v. Emig, 186 Ill. 319, 57 N. E. 883, 78 Am. St. R. 283; Denton v. Arnold, 151 Ind. 188, 51 N. E. 240; Simmons v. Meyers, — Ind. —, 112 N. E. 31; Bryson v. Collmer, 33 Ind. App. 494, 71 N. E. 229; Casteel v. Potter, 176 Mo. 76, 75 S. W. 597; Skinner v. Furnas, 82 Ore. 414, 161 P. 962; Hickey v. Conine, 27 Ohio Cir. Ct. 369; Temple v. Harrington, 90 Ore. 295, 176 P. 430; Groce v. Ponder, 63 S. C. 162, 41 S. E. 83; Evans v. Pegues, 102 S. C. 186, 86 S. E. 480; Wherritt v. Dennis, 48 Utah, 309, 159 P. 534; Building Light & Water Co. v. Fray, 96 Va. 559, 32 S. E. 58.

20. Harrow v. Grogan, 219 Ill. 288, 76 N. E. 350; Mead v. Mead, 27 Misc. 459, 59 N. Y. S. 444.

21. Bell v. Bell, 174 Ala. 446, 56 So. 926; Bothe v. Gleason, 126 Ark. 313, 190 S. W. 562; *In re* Tomlinson, 9 Del. Ch. 446, 81 A. 468; Lohmeyer v. Durbin, 206 Ill. 574, 69 N. E. 523; Chicago Savings Bank & Trust Co. v. Dunn, 204 Ill. App. 181; Sarver v. Clarkson, 156 Ind. 316, 59 N. E. 933; Schaefer v. Purviance, 160 Ind. 63, 66 N. E. 154; Grimes v. Grimes, 141 Ind. 480, 40 N. E. 912; Helm v. Board, 114 Ky. 289, 24 Ky. Law Rep. 1037, 70 S. W. 679; Matney v. Williams, 28 Ky. Law Rep. 494, 89 S. W. 678; McClure v. Harris, 12 B. Monr. (Ky.) 261; Robinson v. Shacklett, 29 Grat. (Va.) 99.

22. Bonner v. Petterson, 44 Ill. 258; *Re* Hall's Estate, L. R. 9 Eq. 179; Davis v. McCandless, 130 Ark. 538, 198 S. W. 132; Roberts v. Shroyer, 68 Ind. 64.

A guardian's *ex parte* sale of realty is a judicial sale within Burns' Ann. St. (Ind.) 1908, § 3052, vesting title in the wife as to her inchoate interest upon judicial sale of her husband's real estate. Huffman v. Huffman, 51 Ind. App. 330, 99 N. E. 769; Helm v. Board, 114 Ky. 289, 24 Ky. Law Rep. 1037, 70 S. W. 679.

23. Virgin v. Virgin, 189 Ill. 144, 59 N. E. 586; McMahan v. Kimball, 3 Blackf. (Ind.) 1; McClain v. McClain, 152 Ky. 206, 153 S. W. 234,

instances, out of the deceased husband's interest in lands or their proceeds, subject to some lien in favor of a vendor or other party with priorities.[24]

§ 1382. The Husband's Seisin; Subject Continued.

The husband's seisin, therefore, was not, even at common law, necessarily one in fact or an actual seisin; to support the wife's dower, it was enough that he had a seisin in law, with a right to an immediate seisin in fact. His seisin might not be an indefeasible one, yet her claim was good so long as it was not actually defeated.[25]

extending opinion 151 Ky. 356, 151 S. W. 926; Mulligan v. Mulligan, 161 Ky. 628, 171 S. W. 420; Hiller v. Nelson, — Ky. —, 118 S. W. 292; Bank v. Owens, 31 Md. 320; Rowland v. Prather, 53 Md. 232; Hall v. Marshall, 139 Mich. 123, 102 N. W. 658, 11 Det. Leg. N. 813, 111 Am. St. R. 404; Bailey v. Bailey, 172 N. C. 671, 90 S. E. 803; Neslor v. Grove, — N. J. —, 107 A. 281; Wood v. Price, 79 N. J. Eq. 14, 81 A. 664; Hinchman v. Stiles, 9 N. J. Eq. 454; Citizens' Sav. Bank v. Mooney, 26 Misc. 67, 56 N. Y. S. 548; Shueler v. Levy, 73 Misc. 25, 130 N. Y. S. 600; Kern v. Kern, 34 Ohio Cir. Ct. 22, affirmed 87 Ohio St. 481, 102 N. E. 1126; Nichols v. French, 83 Ohio St. 162, 93 N. E. 897; Hall's Adm'r v. White, 114 Va. 562, 77 S. E. 475; Land v. Shipp, 100 Va. 337, 41 S. E. 742.

24. 1 Washb. Real Prop. 165, and cases cited; Jackman v. Nowling, 69 Ind. 188; Palmer v. Palmer, 14 R. I. 265.

Where a lien on the husband's land, paramount to dower, was paid by another's money so that the payment did not inure beneficially to him, it was held that such payment did not make the dower right the paramount lien. Land v. Shipp, 100 Va. 337, 41 S. E. 742.

25. McGuire v. Cook (Ark.), 135 S. W. 840; Aloe v. Lowe, 278 Ill. 233, 115 N. E. 862; Stroup v. Stroup, 140 Ind. 179, 39 N. E. 864, 27 L. R. A. 523; Sullivan v. Sullivan, 139 Ia. 679, 117 N. W. 1086; Murphy v. Murphy, — Ky. —, 207 S. W. 491; Landers v. Landers, 151 Ky. 206, 151 S. W. 386; Rice v. Rice, 133 Ky. 406, 118 S. W. 270; Hall v. Campbell, 5 Ky. Law Rep. 246; Hill v. Pike, 174 Mass. 582, 55 N. E. 324; Putney v. Vinton, 145 Mich. 219, 108 N. W. 655, 13 Det. Leg. N. 459; Thomas v. Hesse, 34 Mo. 13, 84 Am. Dec. 66; Worsham v. Collison, 49 Mo. 206; Davis v. Evans, 102 Mo. 164, 14 S. W. 875; Bartlett v. Tinsley, 175 Mo. 319, 75 S. W. 143; Howell v. Parker, 136 N. C. 373, 48 S. E. 762; Phifer v. Phifer, 157 N. C. 221, 72 S. E. 1006.

Nor is a wife entitled to dower in land conveyed by the husband by deeds made before marriage, but not recorded till afterwards. Haire v. Haire, 141 N. C. 88, 53 S. E. 340.

Where a grantor delivered deeds in escrow to be delivered to the

A momentary seisin is enough; as in the old case where a father and son were hanged together, and the latter, being seen to struggle longer than the former, was decided to have inherited the land from his father as he swung, so as to give to his own widow a right of dower therein.[26] But the seisin, though momentary, should be *bona fide* and beneficial, and not by way of conduit merely, as where one is the medium of title to a third party, or purchases with a simultaneous reconveyance to secure the purchase money.[27] The fact that the mortgage back is made on the same day is not of itself conclusive evidence of a merely instantaneous seisin.[28] Not only is the attempt of a husband to defraud his wife of her dower interest in his lands readily frustrated in the courts, but the widow

grantees at his death, he reserving the rents and profits for life, the title passed at the time of the delivery in escrow, and no dower interest attached in favor of a wife under a marriage after the delivery in escrow. Yutte v. Yutte, 39 Misc. 272, 79 N. Y. S. 492.

Where a grantor conveys land in trust, the income to be paid to him, reserving a power of disposition of the land in fee, the widow of such grantor is entitled to dower in said land when he was the owner thereof during coverture. Meyer v. Barnett, 60 W. Va. 467, 56 S. E. 206, 6 L. R. A. (N. S.) 1191. See Lugar v. Lugar, 160 App. Div. 807, 146 N. Y. S. 37; Purdy v. Purdy, 95 Misc. 369, 158 N. Y. S. 683; Boykin v. Springs, 66 S. C. 362, 44 S. E. 934; Spradlin v. Spradlin, 13 Ky. Law Rep. 723, 18 S. W. 14; Nichols v. Park, 78 App. Div. 95, 79 N. Y. S. 547, 12 N. Y. Ann. Cas. 306; 2 Bl. Com. 130, 131; 1 Washb. 173–175; Atwood v. Atwood, 22 Pick. (Mass.) 283; Dunham v. Osborne, 1 Paige (N. Y.), 635; Whithead v. Mallory, 4 Cush. (Mass.) 138; Butler v. Cheatham, 8 Bush (Ky.), 598.

26. Thus where a grantee of land leases the land back to the grantor by the same intrument by which he gets title, his momentary seisin is sufficient. Nolen v. Rice, 23 Ky. Law Rep. 2321, 67 S. W. 36; Cro. Eliz. 503; 2 Bl. Com. 132; 4 Kent Com. 39; Wheatley v. Calhoun, 12 Leigh, 264; Sutherland v. Sutherland, 69 Ill. 481.

27. Holbrook v. Finney, 4 Mass. 566, 3 Am. Dec. 243; Pendleton v. Pomeroy, 4 Allen (Mass.), 510.

Dower does not attach to land where the grantee at the time of the grant executes and delivers a bond to reconvey, and who has no interest independent thereof. Hallett v. Parker, 69 N. H. 134, 39 A. 583. See Slaughter v. Culpepper, 44 Ga. 319; Pendleton v. Pomeroy, 4 Allen (Mass.), 510; Jefferson v. Jefferson, 96 Ill. 551; Moore v. Rollins, 45 Me. 493; Hinds v. Ballou, 44 N. H. 620; Fontaine v. Savings Institution, 57 Mo. 552.

28. Smith v. McCarty, 119 Mass.

now very generally finds her claim sufficiently supported by a mere right of entry in the husband.[29] That equitable seisin which thus supports dower in trust estates corresponds substantially to the legal seisin.[30]

519; Thaxter v. Williams, 31 Mass. 49; Flynt v. Arnold, 43 Mass. 626; Pendleton v. Pomeroy, 86 Mass. 510.

29. Redmond's Adm'x v. Redmond, 112 Ky. 760, 23 Ky. Law Rep. 2161, 66 S. W. 745; Act 3 & 4 Will. IV., ch. 105; 1 Washb. Real Prop. 174, and *n.*; Baker v. Chase, 6 Hill (N. Y.), 482; Emerson v. Harris, 6 Metc. (Mass.) 475.

30. See further, as to equitable estates, 2 P. Wms. 715; 4 Bro. C. C. 521; Robinson v. Miller, 2 R. Monr. (Ky.) 284; 1 Washb. Real Prop. 182-185.

CHAPTER V.

STATUTES AFFECTING DOWER.

SECTION 1383. Dower Defeated in England Under Modern Statutes.
1384. Dower Under Modern American Statutes.
1385. Validity and Effect of Statutes.
1386. Extended to Lands of Which Husband Seised During Coverture.
1387. Limitation to Lands of Which Husband Dies Seised.
1388. Limitation to Lands Owned During Coverture.
1389. Extent of Dower Interest.
1390. Indiana Rule.

§ 1383. Dower Defeated in England Under Modern Statutes.

Manifestly in ancient theory the widow's dower was an independent and valuable interest. But in England, through the medium of trusts and the operation of the doctrine already noticed, the conveyancers for generations have been enabled to defeat this estate. The English Dower Act, 3 & 4 Will. IV, c. 105, while it places dower and curtesy on a like favorable footing as to trust estates, provides further that no widow shall be entitled to dower "out of any land which shall have been absolutely disposed of by her husband in his lifetime or by his will." [31] Little, therefore, is left for the law to operate upon; for the husband, by his independent act, may now extinguish all dower encumbrances whatsoever.

§ 1384. Dower Under Modern American Statutes.

While the law of dower has been gradually fading out of sight in England, it attains its fuller development in this country. Curiously enough, most of the modern cases on this subject are American.[32] In New York the widow can only claim dower in

31. Wms. Real Prop. 194; 1 Washb. Real Prop. 219; Macq. Hus. & Wife, 165. The English Dower Act went into effect in 1834. See *In re* Hall's Estate, L. R. 9 Eq. 179. And as to dower in equity of redemption, see Dawson v. Whitehaven, L. R. 6 Ch. D. 218.

32. 1 Washb. Real Prop. 257, 258; 2 Crabb Real Prop. 154, 155; Hoff-

lands of which her husband died seised and such is the rule of various other States as to equitable estates at least, like an equity of redemption.[33] In several States her interest is treated as something for the benefit of herself and children jointly. In others, the "thirds" are dispensed with, and a different rate is fixed. There are statutes which authorize a wife to clear wild land and reduce it to culture, though it be to cut and clear timber more freely than a dowress was permitted to. And finally, the State of Indiana has set a good example by abolishing both curtesy and dower, and substituting in behalf of husband and wife an interest in fee in one another's real estate, remaining at decease, on principles analogous to the descent and distribution of personal property of intestates; thus placing both sexes on the mutual footing of justice, and treating lands and personal estate as subject to corresponding rules.[34] In some States dower is abolished.[35]

§ 1385. Validity and Effect of Statutes.

It is generally held that the legislature may increase, diminish or abolish, dower,[36] or substitute another estate for it,[37] even as to

man v. Savage, 15 Mass. 130; Symmes v. Drew, 21 Pick. (Mass.) 278; Childs v. Smith, 1 Md. Ch. 483; Crockett v. Crockett, 2 Ohio St. 180; Park Dower, 355; 1 Washb. Real Prop. 168.

33. See *supra*, § 1381; 1 Washb. 163, 164; Sturdevant v. Norris, 30 Ia. 165.

34. 1 Ind. Sts. (1862) 291 *et seq.* And see 1 Washb. Real Prop. 219, and notes; 4 Kent Com. 36, and statutory changes in notes. See Thornton v. Thornton, 45 Ala. 274; Barker v. Dayton, 28 Wis. 367; Hughes v. Merritt, 67 N. C. 386, construing late statutes. The widow's statutory interest in her deceased husband's real estate is not subject to the payment of his debts, any more than a strict dower interest would have been. Mock v. Watson, 41 Ia. 241. Though it would be subject to her own liabilities contracted while widow.

35. Deutsch v. Rohlfing, 22 Colo. App. 543, 126 P. 1123; Class v. Strack (N. J.), 96 A. 405; Hilton v. Thatcher, 31 Utah, 360, 88 P. 20.

36. Slingluff v. Hubner, 101 Md. 652, 61 A. 326; Chouteau v. Missouri Pac. Ry. Co., 122 Mo. 375, 22 S. W. 458, 30 S. W. 299; Norton v. Tufts, 19 Utah, 470, 57 P. 409. See Motley v. Motley, 60 Neb. 593, 83 N. W. 830.

37. Payne v. Payne's Ex'r, Dud. Eq. (S. C.) 124.

inchoate dower rights existing at the time of the enactment of the statute,[38] but it cannot be affected by legislation passed after it has become consummated by the husband's death.[39]

§ 1386. Extended to Lands of Which Husband Seised During Coverture.

But under most statutes dower attaches to all land of which the husband is seised of an estate of inheritance during coverture, either actually,[40] or beneficially, another holding the legal seisin to his use,[41] if he has a right to immediate possession amounting to seisin in law.[42] He must be actually or beneficially seised during coverture.[43]

38. Byington v. Carlin, 146 Ia. 301, 125 N. W. 233; Helm v. Board, 114 Ky. 289, 24 Ky. Law Rep. 1037, 70 S. W. 679; Griswold v. McGee, 102 Minn. 114, 112 N. W. 1020, judgment affirmed on rehearing, 102 Minn. 114, 113 N. W. 382; Rumsey v. Sullivan, 166 App. Div. 246, 150 N. Y. S. 287.

39. Hilton v. Thatcher, 31 Utah, 360, 88 P. 20; Virgin v. Virgin, 189 Ill. 144, 59 N. E. 586; Wiseman v. Beckwith, 90 Ind. 185; Hatch v. Small, 61 Kan. 242, 59 P. 262.

40. McDonald v. McDonald, 120 Ga. 403, 47 S. E. 918; Ward v. Tuttle, 54 Ind. App. 674, 102 N. E. 405; Butler v. Butler, 151 Ia. 583, 132 N. W. 63; Sherod v. Ewell, 104 Ia. 253, 73 N. W. 493; Cate v. Ganter, 31 Ky. Law Rep. 892, 104 S. W. 296; Stephens v. Leonard, 122 Mich. 125, 80 N. W. 1002, 6 Det. Leg. N. 682; Ellis v. Kyger, 90 Mo. 600, 3 S. W. 23; Hall v. Smith, 103 Mo. 289, 15 S. W. 621; Howell v. Jump, 140 Mo. 441, 41 S. W. 976; Jarboe v. Hey, 122 Mo. 341, 26 S. W. 968; Pinkham v. Pinkham, 55 Neb. 729, 76 N. W. 411; Tenbrook v. Jessup, 60 N. J. Eq. 234, 46 A. 516; *In re* Ames, 22 R. I. 54, 46 A. 47; Gardner v. Gardner, 98 Va. 525, 36 S. E. 985, 2 Va. Sup. Ct. R. 445; Coach v. Eastham, 69 W. Va. 710, 73 S. E. 314; Reynolds v. Whitescarver, 66 W. Va. 388, 66 S. E. 518.

41. Talty v. Talty, 40 App. D. C. 587; Davis v. Evans, 102 Mo. 164, 14 S. W. 875; Young v. Thrasher, 115 Mo. 222, 21 S. W. 1104; Brown v. Brown, 82 N. J. Eq. 40, 88 A. 186; Radley v. Radley, 70 N. J. Eq. 248, 62 A. 195; *In re* Ames, 22 R. I. 54, 46 A. 47; Crenshaw v. Moore (Tenn.), 137 S. W. 924, 34 L. R. A. (N. S.) 1161; Claiborne v. Henderson, 3 Hen. & M. (Va.) 322; James v. Upton, 96 Va. 296, 31 S. E. 255; Couch v. Eastham, 69 W. Va. 710, 73 S. E. 314; Hendrickson v. Grable, 157 Mo. 42, 57 S. W. 784; *In re* Cadmus, 68 N. J. Eq. 17, 59 A. 245.

42. Murphy v. Booker, — Ark. —, 214 S. W. 63; Radley v. Radley 70 N. J. Eq. 248, 62 A. 195.

43. Tilley v. Letcher, — Ala. —, 82 So. 527.

§ 1387. Limitation to Lands of Which Husband Dies Seised.

Our local statutes have very generally favored the widow's rights, and unless she has joined her husband in his conveyances during his life, or statutes restrain her rights, she may usually assert the privilege at his death. But dower is found a great inconvenience in an age when real estate passes from hand to hand as an article of commercial traffic; and legislatures show some disposition to get rid of it altogether, together with curtesy. In New York the widow can only claim her dower out of lands of which her husband died seised.[44] Some statutes limit the dower right to land of which the husband dies seised,[45] especially where the wife is a non-resident.[46]

§ 1388. Limitation to Lands Owned During Coverture.

States now generally exclude from dower lands owned prior to coverture.[47]

§ 1389. Extent of Dower Interest.

In some States the statute gives dower in one-third in value of the husband's land.[48] Other statutes give an alternative estate

44. N. Y. Stats. 1860, March 20; Herzog v. Trust Co. of Easton, 67 Fla. 54, 64 So. 426.

Courts will lean against an interpretation of a dower statute which will deprive a widow of her dower. Klocke v. Klocke (Mo.), 208 Mo. 825.

45. Bechtol v. Bechtol, 2 Alaska, 397; Smallridge v. Hazlett, 112 Ky. 841, 23 Ky. Law Rep. 2228, 66 S. W. 1043.

46. McKelvey v. McKelvey, 79 Kan. 82, 99 P. 238; Putney v. Vinton, 145 Mich. 219, 108 N. W. 655, 13 Det. Leg. N. 459; Burr v. Finch, 91 Neb. 417, 136 N. W. 72; Miner v. Morgan, 83 Neb. 400, 119 N. W. 781; Ekegren v. Marcotte, 159 Wis. 539, 150 N. W. 969.

47. Burgoon v. Whitney, 121 Ia. 76, 95 N. W. 229; Britt v. Gordon, 132 Ia. 431, 108 N. W. 319.

In New Hampshire dower does not attach to land which the husband conveys prior to coverture, and has a bond for reconveyance on repayment of the debt. Hall v. Hall, 70 N. H. 47, 47 A. 79.

48. Caudle v. Caudle, 176 N. C. 537, 97 S. E. 472; *In re* Park's Estate, 31 Utah, 255, 87 P. 900.

which the widow may elect in place of dower,[49] or an estate in fee in a portion of the husband's property in lieu of dower,[50] which will pass to the widow's heirs.[51] Such an estate is a substitute for common-law dower.[52] Dower is sometimes given in leaseholds,[53] and in remainders.[54]

49. Adams v. Adams, 183 Mo. 396, 82 S. W. 66; Klocke v. Klocke, — Mo. —, 208 S. W. 825.

50. Beal-Burrow Dry Goods Co. v. Kessinger, 132 Ark. 132, 200 S. W. 1002.

In Arkansas, if there are no children, the widow takes as dower one-third of the husband's personalty as against creditors, and one-half as against collateral heirs, the same rule applying to real estate. Dower will be assigned in real and personal property separately, and a deficiency in either cannot be made up out of the other. Mayo v. Valley, etc., Co., 132 Ark. 64, 200 S. W. 505; McCann v. Daly, 168 Ill. App. 287.

The Kansas statute gives a widow one-half in value of realty of which the husband dies legally or equitably seized. Osborn v. Osborn, 102 Kan. 890, 172 P. 23.

Any interest which the law gives to a widow in the estate of her deceased husband is loosely called "dower." Larned v. Larned, 98 Kan. 328, 158 P. 3.

Like an inchoate right of dower, a wife's statutory right and interest, by descent, in her husband's realty, is a kind of property with incidents *sui generis*, a valuable interest which is frequently the subject of contract and bargain, more than a possibility, which may well be denominated a contingent interest, and also a right of value depending on the incident of ownership. Whiting v. Whiting, 114 Me. 382, 96 A. 500.

In Michigan the dower right is an estate in severalty in such part of the land as will yield one-third of the entire income of the whole. King v. Merritt, 67 Mich. 194, 34 N. W. 689.

The Missouri statute providing that a widow shall not take dower till her husband's "debts, due or to become due," have been paid, includes only liquidated debts, and not an unliquidated right of action for breach of covenant. Bartlett v. Ball, 142 Mo. 28, 43 S. W. 783.

51. Barton v. Wilson, 172 S. W. 1032.

52. Cheney v. Cheney, 110 Me. 61, 85 A. 387.

53. Phillips v. Hardenburg, 181 Mo. 463, 80 S. W. 891; Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 S. W. 486.

54. Under the Connecticut statute providing that dower shall attach to lands of which the husband "dies possessed in his own right," dower may attach to an equitable remainder in fee, though the possession was in the trustee, the dower interest being subject to the paramount title of the trustee for the purposes of the trust. Greene v. Huntington, 73 Conn. 106, 46 A. 883; Mitchell v. Mitchell, 73 Conn. 303, 47 A. 325.

§ 1390. Indiana Rule.

In Indiana, where the husband's title to land is devested by a judicial sale, the wife's dower right becomes consummate at once, as though he were dead, if the decree does not direct that her interest be sold or barred.[55]

55. Green v. Estabrook, 168 Ind. 123, 79 N. E. 373; Purviance v. Emley, 126 Ind. 419, 26 N. E. 167; McCracken v. Kuhn, 73 Ind. 149; Foltz v. Wert, 103 Ind. 404, 2 N. E. 950; Higgins v. Ormsby, 156 Ind. 82, 59 N. E. 321; Gough v. Clift, 81 Ind. 371; Nutter v. Fouch, 86 Ind. 451; Patterson v. Rosenthal, 117 Ind. 83, 19 N. E. 618; Jackman v. Nowling, 69 Ind. 188; Bradley v. Thixton, 117 Ind. 255, 19 N. E. 335.

In such cases she takes an absolute estate (Powers v. Nesbitt, 127 Ind. 497, 27 N. E. 501), and where the estate of an insane husband is sold by order of court (Lawler v. Bear [Ind], 122 N. E. 660), as well as where a mortgage in which she does not join is foreclosed against her husband (Pouder v. Ritzinger, 102 Ind. 571, 1 N. E. 44). The same is true where his estate vests in an assignee in bankruptcy (Haggerty v. Byrne, 75 Ind. 499), becoming tenant in common with the purchaser to the extent of an undivided third, without interest in the other third (Buser v. Shepard, 107 Ind. 417, 8 N. E. 280), and may have such interest set off to her by judicial decree. Bunch v. Grave, 111 Ind. 351, 12 N. E. 514; Wachstetter v. Johnson (Ind.), 108 N. E. 624, 990; Martin v Caldwell, 49 Ind. App. 1, 96 N. E. 660; Pattison v. Wert, 153 Ind. 453, 55 N. E. 227.

CHAPTER VI.

TO WHAT DOWER ATTACHES.

SECTION 1391. To What Dower Attaches.
1392. Adverse Possession.
1393. Land Held Under Contract of Purchase.
1394. Defeasible Fee.
1395. Land Acquired by Devise and Inheritance.
1396. Improvements by Co-Tenant.
1397. Insurance Policies.
1398. Unimproved Lands.
1399. Minerals and Timber.
1400. Rents of Leased Land.
1401. Particular Interests to Which Power Does Not Attach.

§ 1391. To What Dower Attaches.

Dower attaches to all lands, tenements, or hereditaments, corporeal and incorporeal, of which the husband may have been seised in fee or in tail.[56] Generally it attaches without regard to the length of time during which title remains in the husband.[57] But the husband's estate must have been one of inheritance, since the wife's estate is said to be a mere continuance of the estate of her husband. Very nice questions have arisen as to what constitutes an estate of inheritance. Thus where a husband has a life estate with fee-simple in the heirs of his body, his wife cannot claim dower; nor can she in a term of years, however long.[58] Nor can

56. 2 Bl. Com. 131; 1 Washb. Real Prop. 152; Arbaugh v. West, 127 Ark. 98, 192 S. W. 171; Shad v. Smith, Fla., 76 So. 897; Howe v. Brown, Ill., 123 N. E. 46; Haller v. Hawkins, 245 Ill. 492, 92 N. E. 299; Glascock v. Glascock, 217 Mo. 362, 117 S. W. 67; *In re* Dowe, 68 N. J. Eq. 11, 64 A. 803; Holme v. Shinn, 62 N. J. Eq. 1, 49 A. 151; Van Blaricum v. Larson, 130 N. Y. S. 925; Evans v. Heilman, 37 S. D. 499, 159 N. W. 55; Fraser v. Stokes, 112 Va. 335, 71 S. E. 545.

57. Tevis v. Steele, 7 B. Monr. (Ky.) 339.

58. Burris v. Page, 12 Miss. 358; Goodwin v. Goodwin, 33 Conn. 314; 1 Washb. Real Prop. 152. But see Gorham v. Daniels, 611, a case of dower in a husband's life estate. In Massachusetts, dower is expressly

she claim, even though he holds an estate for another's life, and dies before the *cestui que vie*,[59] nor generally where he holds for life only.[60]

§ 1392. Adverse Possession.

If the husband's title depends on adverse possession, the statute must have completely run in order to entitle the wife to dower.[61]

§ 1393. Land Held Under Contract of Purchase.

It is generally held that land of which a husband is possessed under an executory contract of purchase is an "estate of inheritance," within the meaning of statutes regulating dower,[62] even though he has paid but a portion of the purchase price.[63]

Such an interest is equitable, but in such equitable estate there is no inchoate right of dower until the husband's death, and an

allowed in long terms of years, these being treated as real estate while fifty years remain. Mass. Gen. Laws, ch. 186, § 1.

An "estate of inheritance," within the meaning of such rule, need not be one free of incumbrance or lien. Casteel v. Potter, 176 Mo. 76, 75 S. W. 597; Radley v. Radley, 78 N. J. Eq. 170, 78 A. 194; Hazelwood v. Mayes (S. C.), 96 S. E. 672; Gray's Adm'x v. Gray, 144 Ky. 603, 139 S. W. 838.

59. 1 Washb. Real Prop. 153; Park Dower, 48; Gillis v. Brown, 5 Cow. 388; Fisher v. Grimes, 1 S. & M. Ch. 107; 2 Bl. Com. 129. Statutes sometimes provide for such cases. 1 Washb. 153.

60. Harriot v. Harriot, 25 App. Div. 245, 49 N. Y. S. 447.

61. Smallridge v. Hazlett, 112 Ky. 841, 23 Ky. Law Rep. 2228, 66 S. W. 1043; O'Bryan v. Allen, 108 Mo. 227, 18 S. W. 892, 32 Am. St. R. 595; Nichols v. Park, 78 App. Div. 95, 12 N. Y. Ann. Cas. 306, 79 N. Y. S. 547.

62. *In re* Ransom, 17 Fed. 331; *In re* Boshart's Estate, 177 N. Y. S. 567; Harley v. Harley, 140 Wis. 282, 122 N. W. 761. A full equitable title to real estate and a beneficial interest therein, the holder of the legal title having no duty to perform except to convey to the holder of the equitable title, is an estate of inheritance within the dower statute. *Contra*, Hutchinson v. Olberding, 136 Ia. 346, 112 N. W. 647; Conelly v. Swann, 141 Ga. 112, 80 S. E. 553; Moran v. Catlett, 93 Neb. 158, 139 N. W. 1041. See Campbell v. Whisman (Ky.), 209 S. W. 27; Dalton v. Mertz, 197 Mich. 390, 163 N. W. 912.

63. Spalding v. Haley 101 Ark. 296, 142 S. W. 172; Spence v. Mathis, 137 Ga. 514, 73 S. E. 739.

assignment by the husband defeats all possibility of dower, as it is considered inconvenient to hamper the assignability of executory contracts by giving a wife an inchoate right of dower in their benefits.[64]

§ 1394. Defeasible Fee.

Where the husband has a defeasible fee in land which is terminated on his dying without children, and he does die without children, his widow nevertheless has dower in the property. Since the estate of which he was seised was one that could pass to his heirs, it was an estate of inheritance, and it is to estates of this character that dower attaches. Though his estate expired when he dies without leaving children, still his previous seisin of the estate of inheritance therein during the coverture is a basis of dower in his widow.[65]

§ 1395. Land Acquired by Devise and Inheritance.

Dower applies to land taken by devise,[66] and to land acquired in various old-fashioned rights by way of inheritance which are mentioned in the books; and in general wherever no possibility continues interposed to prevent the husband's estate from becoming one of entire inheritance during marriage.[67]

§ 1396. Improvements by Co-Tenant.

Where one co-tenant improves the common property by building upon it he has an equity against the other co-tenants to be allowed for the value of the improvements in some way on partition. The

64. Corcorren v. Sharum (Ark. 1920), 217 S. W. 803; Morse v. Thorsell, 78 Ill. 600; Heed v. Ford (Ky.), 16 B. Mon. 114; Nortnass v. Pioneer Townsite Co., 82 Neb. 382, 117 N. W. 951; Hicks v. Stebbins (N. Y.), 3 Lans. 39.

65. Couch v. Eastham, 69 W. Va. 710, 73 S. E. 314, 39 L. R. A. (N. S.) 307.

66. Haw v. Brown, 1 MacArthur (D. C.), 189; Johnson v. Jacob, 11 Bush (Ky.), 646; Schick v. Whitcomb, 68 Neb. 784, 94 N. W. 1023.

67. 1 Washb. Real Prop. 157-167; Mayburry v. Brien, 15 Pet. (U. S.)

court will, when possible on partition, give him his share in the property out of the part which he has improved. This right is not, however, a legal title in which dower can be claimed. Dower can be claimed only in lands of which the husband died seised and possessed, to which he had a legal title. Hence in assigning dower the court should not assign to the widow a dower estate in the improvements placed there by the husband in addition to assigning dower to the land itself.[68]

§ 1397. Insurance Policies.

Under a statute providing that dower shall cover personal property the widow will take dower in insurance policies taken out by her husband on his life, and made payable to his executors on his death, as was seised of them under the insurance laws, and of their proceeds. It is too great a refinement to divide the moment of the testator's death so as to say that a debt which accrued at his death was not owing at his death. It would be making a fanciful distinction to say that this money, which clearly forms part of the testator's estate, was not owing to the testator, because it could not, in any event, be paid to himself, but must be received by his representitives.[69]

§ 1398. Unimproved Lands.

Dower generally attaches to wild lands in our country, at the present day, though perhaps not at the common law;[70] and to land

21; Reynard v. Spence, 4 Beav. 103; Park Dow, 58, 72; Billings v. Taylor, 1 Pick. (Mass.) 460; Stevens v. Owen, 25 Me. 94; 4 Kent Com. 40; 2 Bl. Com. 132.

68. Helmken v. Meyer, 138 Ga. 457, 75 S. E. 586, 45 L. R. A. (N. S.) 738.

69. Burdett v. Burdett, 26 Okla. 416, 109 Pac. 922, 35 L. R. A. (N. S.) 964.

70. Land valuable for pasturage during the summer, or valuable for a summer resort as laid out by the deceased owner, and which may be occupied and improved by the widow without committing waste, is not "wild land," within Rev. Laws, ch. 132, § 3, declaring that a widow shall not be entitled to dower in wild land, and the same may be set off to her as dower. Goodspeed v. Lawrence, 208 Mass. 258, 94 N. E. 395; Leavitt v. Tasker, 107 Me. 33, 76 A. 953. Under the New Hampshire statute

entered under a land warrant,[71] or to unimproved flats covered by tide water.[72]

§ 1399. Minerals and Timber.

The word "land" in dower statutes has been held to be comprehensive, and to include minerals in land assigned as dower,[73] gas,[74] and oil flowing from wells on it,[75] coal in place,[76] timber growing on it,[77] gravel and clay,[78] but not placer mining claims.[79] Some cases, however, hold that dower attaches only to minerals

restricting dower to lands under "cultivation," it was held that the statute did not include lands once cultivated but afterwards permitted to revert to a state of nature. Snow v. Snow, 75 N. H. 433, 75 A. 881. See 1 Washb. Real Prop. 167, and cases cited.

71. Purcell v. Lang, 108 Ia. 198, 78 N. W. 1005.

72. Brackett v. Persons Unknown, 53 Me. 238, 87 Am. Dec. 548; Burdine v. Burdine's Ex'r, 98 Va. 515, 2 Va. Sup. Ct. 438, 36 S. E. 992, 81 Am. St. R. 741.

73. Higgins Oil & Fuel Co. v. Snow, 113 F. 433; Kentucky River Consol. Coal Co. v. Frazier, 161 Ky. 374, 170 S. W. 986 (holding that a dowress may not mine coal otherwise than subservient to a comfortable enjoyment of her life estate).

74. Rumsey v. Sullivan, 166 App. Div. 246, 150 N. Y. S. 287; Campbell v. Lynch, 81 W. Va. 374, 94 S. E. 739, L. R. A. 1918B, 1070.

75. Willford v. Heimhoffer, 25 Ohio Cir. Ct. 748; Campbell v. Lynch, 81 W. Va. 374, 94 S. E. 739, L. R. A. 1918B, 1070.

76. Shupe v. Rainey, 255 Pa. 432, 100 A. 138; Reynolds v. Whitescarver, 66 W. Va. 388, 66 S. E. 518.

77. Under Timber Culture Act June 14, 1878, ch. 190, 20 Stat. 113, providing that if the person making an entry on land, at the time when the right to a patent accrues, is dead, the "heirs or legal representatives" of the entryman may prove compliance with the provisions of the act, a patent issued to the "heirs" of the entryman passed title directly to the "heirs," as substituted beneficiaries, who took by purchase, and not by descent; and hence the widow of the entryman acquired no interest as such widow, since no title passed to the entryman in which she could take a right of dower. Braun v. Mathieson, 139 Iowa, 409, 116 N. W. 789; Delaney v. Manshum, 146 Mich. 525, 109 N. W. 1051, 13 Det. Leg. N. 876; Midyette v. Grubbs, 145 N. C. 85, 58 S. E. 795, 13 L. R. A. (N. S.) 278.

78. Delaney v. Manshum, 146 Mich. 525, 109 N. W. 1051, 13 Det. Leg. N. 876.

79. Bechtol v. Bechtol, 2 Alaska, 397.

and the like only where mines have been opened in the husband's lifetime.[80]

§ 1400. Rents of Leased Land.

Where the deceased husband has executed leases of oil and gas lands the leases necessarily excluded assignment of possession thereof as dower, as the lessees had exclusive right of possession. Dower could be had only in what was substituted for them, the rents and royalties. The common law allowed dower in rents, and the widow is entitled to dower in rents and royalties accruing from all the wells on the entire tracts.[81]

§ 1401. Particular Interests to Which Dower Does Not Attach.

Dower does not attach to land conveyed before coverture by a deed delivered, but not recorded, before coverture,[82] or by a deed incorrectly describing the land, which deed is reformed after coverture,[83] nor to land which before marriage the husband agreed to sell,[84] nor to land held by the entirety,[85] nor to land acquired under a tax sale, where the tax title is barred before the expiration of the period limited for redemption;[86] or to land conveyed by the husband before coverture in fraud of creditors,[87] nor to land owned by a corporation though her husband owns all the stock,[88] nor in

80. Daniels v. Charles, 172 Ky. 238, 189 S. W. 192; Shupe v. Rainey, 255 Pa. 432, 100 A. 138.

81. Campbell v. Lynch, 81 W. Va. 374, 94 S. E. 739, L. R. A. 1918B, 1070.

82. Givens v. Marbut, 259 Mo. 223, 168 S. W. 614; Haire v. Haire, 141 N. C. 88, 53 S. E. 340; Britt v. Gordon, 132 Iowa, 431, 108 N. W. 319.

83. Melton v. Lane, 29 Okl. 383, 118 P. 141.

84. Mineral Development Co. v. Hall (Ky.), 115 S. W. 230.

85. Roulston v. Hall, 66 Ark. 305, 50 S. W. 690, 74 Am. St. R. 97; McCreary v. McCorkie (Tenn.), 54 S. W. 53.

86. Ross v. McGrath's Adm'r, 27 Ky. Law Rep. 723, 86 S. W. 555; Glos v. Gerrity, 190 Ill. 545, 60 N. E. 833.

87. Adkins v. Adkins (Tenn. Ch.), 52 S. W. 728; Johnson v. Johnson, 106 Ark. 9, 152 S. W. 1017.

88. Poillon v. Poillon, 90 App. Div. 71, 85 N. Y. S. 689.

the husband's land taken by eminent domain.[89] Burial grounds are not subject to dower in Missouri.[90]

89. In such cases dower attaches to the damages awarded or agreed on as compensation for the taking. Lavery v. Hutchinson, 249 Ill. 86, 94 N. E. 6; Flynn v. Flynn, 171 Mass. 312, 50 N. E. 650, 425 L. R. A. 98, 68 Am. St. R. 427; Chouteau v. Missouri Pac. Ry. Co., 122 Mo. 375, 22 S. W. 458, 30 S. W. 299; Arnold v. Buffalo, R. & P. Ry. Co., 32 Pa. Super. 452.

90. Chouteau v. Missouri Pac. Ry. Co., 122 Mo. 375, 22 S. W. 458, 30 S. W. 299.

CHAPTER VII.

ASSIGNMENT OF DOWER.

SECTION 1402. Assignment of Dower to the Widow.
1403. By Court.
1404. By Heir or by Agreement.
1405. Time and Manner of Assignment.
1406. Necessity for Demand.

§ 1402. Assignment of Dower to the Widow.

The right of a wife to dower becomes complete on the husband's death, leaving her surviving him. Until dower has been assigned her, the position she occupies is a peculiar one; she has rather a right than an estate; but the moment dower has been assigned and she enters upon the assigned premises, the freehold is vested in her by virtue and in continuance of her husband's seisin.[91] But some cases hold that she takes as a purchaser by virtue of her marital rights.[92]

91. Martin v. Martin, 5 Ky. Law Rep. 318; Joplin Brewing Co. v. Payne, 197 Mo. 422, 94 S. W. 896; First Nat. Bank v. Kirby, 269 Mo. 285, 190 S. W. 597; Bell v. Golding, 151 App. Div. 945, 136 N. Y. S. 278; Atwood v. Arnold, 23 R. I. 609, 51 A. 216; Hoy v. Varner, 100 Va. 600, 42 S. E. 690.

As to methods and effect of assignment, see 1 Washb. Real Prop. 222-250; Park Dow. 339; 4 Kent Com. 61; Jones v. Brewer, 1 Pick. (Mass.) 314; Shepardson v. Rowland, 28 Wis. 108; Wooster v. Hunts Lyman Iron Co., 38 Conn. 256; *infra*, as to quarantine, § 1452; Cravens v. Winzenberger 97 Ill. App. 335.

92. Bowers v. Lillis (Ind.), 115 N. E. 930; Bookout v. Bookout, 150 Ind. 63, 49 N. E. 824, 65 Am. St. R. 350; Keener v. Grubb, 44 Ind. App. 564, 89 N. E. 896; Wachstetter v. Johnson (Ind.), 108 N. E. 624, 990; Stitt v. Smith, 102 Minn. 253, 113 N. W. 632, 13 L. R. A. (N. S.) 723; Reese v. Stires, 87 N. J. Eq. 32, 103 A. 679.

A widow's right to dower is not in succession to that of her husband on his death, since she does not succeed to the husband's title, so far as her dower estate is concerned, by the intestate laws, but derives it by virtue of the marriage and in her own right as wife, to be consummated in severalty to her on the husband's death. Crenshaw v. Moore (Tenn.), 137 S. W. 924, 34 L. R. A. (N. S.) 1161.

§ 1403. By Court.

Being entitled to a life-third in the lands, an assignment of her portion may be made accordingly; usually by judicial proceedings.[93] In the absence of statute only courts of equity have jurisdiction to assign dower,[94] but the legislature may vest jurisdiction of such proceedings in probate or other courts,[95] or vest concurrent jurisdiction in courts of both law and equity.[96]

§ 1404. By Heir or by Agreement.

At common law an heir was bound to assign dower and had the power to do so without an order of court,[97] but the husband's executor had no such power.[98] Dower may be assigned by agree-

93. *In re* Seabolt, 113 F. 766; Snodgrass v. Clark, 44 Ala. 198; Carter v. Younger, 112 Ark. 483, 166 S. W. 547; Virgin v. Virgin, 91 Ill. App. 188, affd., 189 Ill. 144, 59 N. E. 586; Saunders v. Hamilton, 26 Ky. Law Rep. 851, 82 S. W. 630; Swobe v. Marsh, 73 Neb.. 331, 102 N. W. 619; Tyson v. Tyson, 71 Neb. 438, 98 N. W. 1076; Dudley v. Tyson, 167 N. C. 67, 82 S. E. 1025; Whitaker v. Greer, 129 Mass. 417. See Murphy v. Borland, 92 Pa. 86; Flaherty v. Sutton, 49 Mo. 583; Sill v. Sill, 185 Ill. 594, 57 N. E. 812; Chrisman v. Linderman, 202 Mo. 605, 100 S. W. 1090, 10 L. R. A. (N. S.) 1205; *In re* Dahlman's Estate, 28 Mont. 379, 72 P. 750.

94. Kendall v. Crenshaw (Ark.), 173 S. W. 393; Mettler v. Warner, 243 Ill. 600, 90 N. E. 1099; Lavery v. Hutchinson, 139 Ill. App. 61; Sprague v. Stevens, 32 R. I. 361, 79 A. 972; Kavanaugh v. Shacklett's Adm'r, 111 Va. 423, 69 S. E. 335.

95. Johnson v. Johnson, 84 Ark. 307, 105 S. W. 869; Jameson v. Davis, 124 Ark. 399, 187 S. W. 314; McGaugh v. Mathis, 131 Ark. 221, 198 S. W. 1147; Humphrey v. Gerard, 84 Conn. 216, 79 A. 57; Miller v. Falloon (Mo.), 187 S. W. 839; Powell v. Crittenden, 57 Okla. 1, 156 P. 661; Browne v. Coleman, 62 Ore. 454, 125 P. 278; Willock v. Willock, 29 R. I. 511, 72 A. 817.

96. Beal-Burrow Dry Goods Co. v. Kessinger, 132 Ark. 132, 200 S. W. 1002; Johnson v. Johnson, 84 Ark. 307, 105 S. W. 869.

97. In Alabama the statute providing for the assignment of dower by the court is not exclusive of the right of the heir to assign it. Sloss, etc., Co. v. Sheffield (Ala.), 80 So. 842; Brinkley v. Taylor, 111 Ark. 305, 163 S. W. 521; Heimburger v. Holtapp, 206 Ill. App. 602; Jones v. Brewer, 1 Pick. (Mass.) 314; Ryder v. Kennedy, 224 N. Y. 407, 121 N. E. 346; Moore v. Waller, 2 Rand. (Va.) 418.

98. Jameson v. Davis, 124 Ark. 399, 187 S. W. 314.

ment of all parties interested, without an order of court,[99] even where the agreement is parol,[1] and such an assignment is binding on creditors of the heir.[2]

§ 1405. Time and Manner of Assignment.

Usually either the widow or the heir may institute proceedings for assignment,[3] which may be had without waiting for administration proceedings on her husband's estate.[4] It should be made before ordering a sale to pay debts,[5] but may be made even after the estate is fully closed.[6] The whole dower right should be assigned at one time, to avoid multiplicity of suits,[7] and is governed by the law of the State where the land lies,[8] and by the law

99. Wilson v. Roebuck, 180 Ala. 288, 60 So. 870.

Where such an agreement is relied on as a defence to an action for dower it must be specially pleaded. Carter v. Younger, 123 Ark. 266, 185 S. W. 435; Callaway v. Irwin, 123 Ga. 344, 51 S. E. 477; Heimburger v. Holtapp, 206 Ill. App. 602; Britt v. Gordon, 132 Ia. 431, 108 N. W. 319.

Such an agreement is a sufficient compliance with the Ohio statute requiring that a widow's acceptance of property in lieu of dower shall be in writing. Smith v. Whistler, 16 Ohio Cir. Ct. R. 130, 8 O. C. D. 768; Hazelwood v. Mayes (S. C.), 96 S. E. 672; Simms v. Yerkes, 239 Pa. 595, 87 A. 56.

1. Chicago, B. & D. Ry. v. Kelly, 221 Ill. 498, 77 N. E. 916; Pearce v. Pearce, 184 Ill. 289, 56 N. E. 311; McFarland v. McFarland (Mo.), 211 S. W. 23.

2. Brewer v. Brown, 268 Ill. 562, 109 N. E. 264.

3. Robertson v. Robertson, 68 So. 52; Hamby v. Hamby, 165 Ala. 171, 51 So. 732; Allen-West Commission Co. v. Harshaw, 123 Ark. 55, 184 S. W. 436.

4. Briggs v. Manning, 80 Ark. 304, 97 S. W. 289; White v. Spaulding, 50 Mich. 22, 14 N. W. 684.

5. Wilson v. Branch, 77 Va. 65, 46 Am. R. 709; Sommerville v. Sommerville, 26 W. Va. 484.

6. King v. Merritt, 67 Mich. 194, 34 N. W. 689.

Where infant heirs assigned dower and afterwards disaffirmed, it was held that the widow might have a judicial assignment. McFarland v. McFarland (Mo.), 211 S. W. 23.

7. Moran v. Stewart, 246 Mo. 462, 151 S. W. 439.

8. Thomas v. Woods, 173 F. 585, 97 C. C. A. 535; Mayo v. Arkansas Valley Trust Co., 132 Ark. 64, 200 S. W. 505; Perry v. Wilson (Ky.), 208 S. W. 776; Whitman v. Huefner, 221 Mass. 265, 108 N. E. 1054; Wyatt v. Wilhite, 192 Mo. App. 551, 183 S. W. 1107; Roessle v. Roessle, 148 N. Y. S. 659.

in force at the time of the husband's death.[9] The assignment must be for her life, and not merely for widowhood.[10] The widow may require it to be set off to her in land, and cannot be compelled to take its value in money.[11] Where there are several tracts dower attaches, her whole dower may be assigned in one or more of them, if such assignment be of the proper proportion of the value of all,[12] but it is not error to assign dower in each parcel where the parcels are not owned by different persons.[13] The dower may be set off by metes and bounds, if capable of division,[14] and if not, it may be treated as a whole and the widow given her proportion of the rents and profits,[15] or it may be sold and dower assigned out

9. Robertson v. Robertson, 191 Ala. 297, 68 So. 52; Vaughn v. Vaughn, 180 Ala. 212, 60 So. 872; Thorpe v. Lyones, 160 Ia. 415, 142 N. W. 82; Lucas v. Purdy, 142 Ia. 359, 120 N. W. 1063; McAllister v. Dexter & P. R. Co., 106 Me. 371, 76 A. 891; Dougherty v. Dougherty, 204 Mo. 228, 102 S. W. 1099; Carey v. West, 139 Mo. 146, 40 S. W. 661; Hilton v. Thatcher, 31 Utah, 360, 88 P. 20.

10. A provision in a judgment awarding to a widow a "life use" of an interest in certain property in controversy instead of a right of dower therein has been held improper, the life use not being the same as dower interest, prior to assignment of dower. Humphrey v. Gerard, 84 Conn. 216, 79 A. 57; Davison v. Davison, 207 Mo. 702, 106 S. W. 1.

11. Johnson v. Johnson, 91 Ark. 292, 122 S. W. 656; Ellguth v. Ellguth, 250 Ill. 214, 95 N. E. 169; Land v. Shipp, 100 Va. 337, 41 S. E. 742; Finney v. Finney, 144 Ky. 114, 138 S. W. 257.

12. Hollis v. Watkins, 189 Ala. 292, 66 So. 29; Arbaugh v. West, 127 Ark. 98, 192 S. W. 171; Rice v. Rice, 147 Ia. 1, 125 N. W. 826; Rice v. Rice (Ia.), 119 N. W. 714.

13. Wiley v. Wiley, 178 Ky. 501, 199 S. W. 47.

Where part of the land was leased by the heir and there was sufficient other land in which to assign dower, it was held that the lessee might insist that the assignment be made in such other land. Ingram v. Corbit (N. C.), 99 S. E. 18.

14. Shupe v. Rainey, 255 Pa. 432, 100 A. 138; Willock v. Willock, 29 R. I. 511, 72 A. 817; Arnold v. Probate Court of North Kingstown, 25 R. I. 506, 56 A. 772.

15. Klein v. Klein, 276 Ill. 520, 114 N. E. 1028; Grote v. Grote, 275 Ill. 206, 113 N. E. 967; Haugh v. Pierce, 97 Me. 281, 54 A. 727; Bartlett v. Ball, 92 Mo. App. 57; Burton v. Mellis, 75 N. J. Eq. 10, 72 A. 13; Howells v. McGraw, 97 App. Div. 460, 90 N. Y. S. 1; Warren v. Warren, 57 App. Div. 628, 67 N. Y. S. 905; Arnold v. Probate Court of North Kingstown,

of the proceeds.[16] If sold, she is entitled to her proportionate part of the gross proceeds, without deduction for expenses after the husband's death, such as repairs, taxes, etc., and the expenses of the sale.[17]

§ 1406. Necessity for Demand.

In some cases a widow must demand her dower, especially where she seeks damages for its detention.[18] Where it is required, it must be made as required by the statute,[19] and must usually be in writing,[20] but commencement of an action for assignment is sufficient.[21] The dowress need not demand dower where she has agreed with the heirs to remain in possession and collect rents.[22]

25 R. I. 506, 56 A. 772; Conlon v. Kelly, 137 App. Div. 277, 121 N. Y. S. 1084.

16. Rice v. Rice, 147 Ia. 1, 125 N. W. 826.

17. Wild v. Toms, 123 Ia. 747, 99 N. W. 700.

18. Hyatt v. O'Connell, 130 Ia. 567, 107 N. W. 599; Sprague v. Stevens, 32 R. I. 361, 79 A. 972.

19. Osborn v. Osborn, 102 Kan. 890, 172 P. 23.

20. McAllister v. Dexter & P. R. Co., 106 Me. 371, 76 A. 891.

21. Warner v. Warner, 235 Ill. 448, 85 N. E. 630; Claussen v. Claussen, 279 Ill. 99, 116 N. E. 693; Killackey v. Killackey, 166 Mich. 311, 131 N. W. 519.

22. Potter v. Clapp, 203 Ill. 592, 68 N. E. 81, 96 Am. St. R. 322; Yarbrough v. Yarbrough (Ala.), 75 So. 932.

CHAPTER VIII.

RIGHTS OF WIDOW ARISING FROM DOWER.

SECTION 1407. Rights of Widow Before Death or Assignment of Dower.
1408. Rights of Widow After Assignment.
1409. Rights to Convey Before Assignment of Dower.
1410. Rights to Convey After Assignment of Dower.
1411. Actions Before and After Assignment of Dower.
1412. Priorities as Against Liens.
1413. Rights to Profits Before Assignment of Dower.
1414. Enjoining Waste.
1415. Rights in Timber and Improvements.
1416. Right to Contest Husband's Will.
1417. Effect of Conveyance by Heirs.
1418. Rights of Husband's Creditors.
1419. Gross Sum in Lieu of Dower.
1420. To Possession.
1421. Liability for Taxes.
1422. Inheritance Taxes.
1423. Inheritance Tax Where Widow Takes Under Will.

§ 1407. Rights of Widow Before Death or Assignment of Dower.

While dower is inchoate the wife can have nothing much better than a right of action till dower is consummate on her husband's death,[23] or, according to some cases, till assignment.[24] Until

23. Wootten v. Vaughn (Ala.), 81 So. 660; Chavers v. Mayo (Ala.), 79 So. 594; Upshaw v. Upshaw, 180 Ala. 204, 60 So. 804; Arbaugh v. West, 127 Ark. 98, 192 S. W. 171; Mayo v. Arkansas Valley Trust Co. (Ark.), 209 S. W. 276; Grubbs v. Leyendecker, 153 Ind. 348, 53 N. E. 940; Hamblin v. Marchant (Kan.), 180 P. 811; Jodd v. St. Louis, I. M. & S. Ry. Co., 259 Mo. 239, 168 S. W. 611; McClanahan v. Porter, 10 Mo. 746; Tenbrook v. Jessup, 60 N. J. Eq. 234, 46 A. 516; Rumsey v. Sullivan, 150 N. Y. S. 287, 166 App. Div. 246; Long v. Long (Ohio), 124 N. E. 161; Huddleston v. Miller, 81 W. Va. 357, 94 S. E. 538; Haskell v. Sutton, 53 W. Va. 206, 44 S. E. 533.

24. Underground Electric Rys. Co. of London v. Owsley, 196 F. 278; Francis v. Sandlin, 150 Ala. 583, 43 So. 829; Martin v. Evans, 163 Ala. 657, 50 So. 997; Wilson v. Roebuck, 180 Ala. 288, 60 So. 870; Chicago, B. & D. Ry. v. Kelly, 221 Ill. 498, 77 N. E. 916; Heimburger v. Holtapp, 206 Ill. App. 602; Munsey v. Hanly, 102 Me.

assignment her right is not a defence of ejectment[25] or to an action for disseisin,[26] so that she may be regarded as a trespasser after the period of quarantine has passed.[27] An inchoate right of dower is, nevertheless, a substantial right of property where dower attaches to all land of which the husband is seised during coverture, which the courts will protect, even during his life,[28] and which she may defend at any time after coverture.[29] Where such is the law, inchoate dower must be regarded as a contingent estate of some dignity,[30] which becomes consummate at the instant of the husband's death,[31] and more than a mere encumbrance[32] or lien.[33] Where she is left in possession at her husband's death, she may be regarded as a tenant at will till assignment.[34] The wife's inchoate

423, 67 A. 217; Neal v. Davis, 53 Ore. 423, 101 P. 212; Coleman v. Virginia Stave & Heading Co., 112 Va. 61, 70 S. E. 545.

25. Ricknor v. Clabber, 4 Ind. T. 660, 76 S. W. 271; King v. Merritt, 67 Mich. 194, 34 N. W. 689; McCammon v. Detroit L. & N. R. Co., 66 Mich. 442, 33 N. W. 728.

26. Taylor v. McCrackin, 2 Blackf. (Ind.) 260.

27. Cave v. Anderson, 50 S. C. 293, 27 S. E. 693.

28. Kelly v. Minor, 252 F. 115; *In re* Acretelli, 173 F. 121; Dennis v. Harris (Iowa), 153 N. W. 343. Thus a widow may maintain a suit to enjoin trespass on land in which she has a dower right without waiting for the assignment of dower and without joining the other tenants. Delaney v. Manshum, 146 Mich. 525, 109 N. W. 1051, 13 Det. Leg. N. 876; Brown v. Brown, 94 S. C. 492, 78 S. E. 447.

29. Minneapolis & St. L. R. Co. v. Lund, 91 Minn. 45, 97 N. W. 452; Grube v. Lilienthal, 51 S. C. 442, 29 S. E. 230.

30. Kelly v. Minor, 252 F. 115; La Grante Mills v. Kener, 121 Ga. 429, 49 S. E. 300; Bever v. North, 107 Ind. 544, 8 N. E. 576; Ohio Farmers' Ins. Co. v. Bevis, 18 Ind. App. 17, 46 N. E. 928; David Adler & Sons Clothing Co. v. Hellman, 55 Neb. 266, 75 N. W. 877; Geiger v. Geiger, 57 S. C. 521, 35 S. E. 1031.

31. Humphrey v. Gerard, 85 Conn. 434, 83 A. 210; Null v. Howell, 111 Mo. 273, 20 S. W. 24; Motley v. Motley, 53 Neb. 375, 73 N. W. 738, 68 Am. St. R. 608; Worthington v. Worthington, 9 Kulp (Pa.) 513; Headley v. Colonial Oil Co., 67 W. Va. 628, 69 S. E. 296.

32. Frain v. Burgett, 152 Ind. 55, 25 N. E. 395.

33. Kaufman v. Heckman, 32 Ohio Cir. Ct. 277; Kern v. Kern, 34 Ohio Cir. Ct. 22, judgment affirmed, 87 Ohio St. 481, 102 N. E. 1126.

34. Jordan v. Sheridan, 149 Ky. 783, 149 S. W. 1028.

right of dower is not such an interest as entitles her to contest the will of her husband's father.[35]

§ 1408. Rights of Widow After Assignment.

After assignment the estate of a dowress is that of a freeholder for life, to the extent of her interest. She is answerable for waste, and entitled to her proportion of rents, profits, and reasonable estovers. As to the estate subject to which she holds her dower, she must keep down one-third of the interest upon encumbrances or charges while she lives.[36] The rights of a dowress are not dependent on continued occupation or possession of the land assigned.[37] The widow's rights determine on her death, either

35. *Re* Rollwagen, 48 How. Pr. (N. Y.) 103.

36. Neeley v. Martin, 126 Ark. 1, 189 S. W. 182; Nashville Lumber Co. v. Barefield, 93 Ark. 353, 124 S. W. 758. The word "maintain," within the Connecticut statute, requiring widows to "maintain" and keep in repair the property set apart to them as dower, does not mean "to provide" or "construct," but means to "keep up, not to suffer to fail or decline"; "keep in repair" and "maintain" as used in the statute being synonymous. Ferguson v. Rochford, 84 Conn. 202, 79 A. 177; Rowley v. Poppenhager, 203 Ill. 434, 67 N. E. 975. Where a widow, entitled under the Illinois statute to the exclusive possession of the real estate of her husband, received all the rents and profits, she must pay the taxes and special assessments levied against the premises. Lambert v. Hemler, 224 Ill. 254, 91 N. E. 435; Shemwell v. Carper's Adm'r, 27 Ky. 997, 87 S. W. 771. A dowress is liable for waste committed by a third person to whom she aliens her estate. Foot v. Dickinson, Metc. (Mass.) 611. Nor is suffering wood to grow upon pasture land. Clark v. Holden, 7 Gray (Mass.), 8, 66 Am. Dec. 450. Cutting trees for firewood is not waste by a dowress. Padelford v. Padelford, 7 Pick. (Mass.) 152; Sunter v. Sunter, 190 Mass. 449, 77 N. E. 497; Stearns v. Perrin, 130 Mich. 456, 90 N. W. 297, 9 Det. Leg. N. 114. Permissive waste by a dowress may be set off against permanent improvements made by her. Sherrill v. Connor, 107 N. C. 630, 12 S. E. 588; Howell v. Newman, 59 Hun (N. Y.), 538, 13 N. Y. S. 648; Kunselman v. Stine, 182 Pa. St. 1, 38 A. 414, 41 Wkly. Notes Cas. 82; Brayton v. Jordan, 24 R. I. 6, 51 A. 1047. But she is liable for waste where she cuts merchantable timber. Hawpe v. Bumgardner, 103 Va. 91, 48 S. E. 554; 1 Washb. 257; Cook v. Cook, 11 Gray (Miss.) 123; Dulaney's Adm'r v. Dulaney, 105 Va. 429, 54 S. E. 40.

37. Rowley v. Poppenhager, 203 Ill. 434, 67 N. E. 975; Phillips v. Williams, 130 Ky. 773, 113 S. W.

before or after assignment.[38] Some cases hold that the widow is not a tenant in common with the heir,[39] but others hold that she is a tenant in common to the extent of her interest.[40]

§ 1409. Rights to Convey Before Assignment of Dower.

It is usually held that until assignment she cannot assign or transfer,[41] mortgage,[42] or lease her interest,[43] but in some States she may transfer it after her husband's death and before assignment,[44] carrying an equitable right to have dower assigned,[45] or

908; Bartee v. Edmunds, 29 Ky. Law Rep. 872, 96 S. W. 535.

38. Heimburger v. Holtapp, 206 Ill. App. 602; Whitaker v. Shuman, 161 Ill. App. 568; Cain's Adm'r v. Kentucky & Indiana Bridge & R. Co., 124 Ky. 449, 99 S. W. 297, 30 Ky. Law Rep. 593; Sunter v. Sunter, 190 Mass. 449, 77 N. E. 497; Port Jefferson Realty Co. v. Woodhull, 112 N. Y. S. 678, 128 App. Div. 188; Simms v. Yerkes, 239 Pa. 595, 87 A. 56, affirming decree 52 Pa. Super. Ct. 105; Simms v. Yerkes, 52 Pa. Super. Ct. 105.

39. Hamby v. Hamby, 165 Ala. 171, 51 So. 732; Neal v. Davis, 53 Ore. 423, 99 P. 69, rehearing denied, 53 Ore. 423, 101 P. 212.

40. Bloom v. Sawyer, 121 Ky. 308, 28 Ky. Law Rep. 349, 89 S. W. 204.

41. Pacific Bank v. Hannah, 90 F. 72, 32 C. C. A. 522; Arbaugh v. West, 127 Ark. 98, 192 S. W. 171; Flowers v. Flowers, 84 Ark. 557, 106 S. W. 949; Chicago, B. & D. Ry. v. Kelly, 221 Ill. 498, 77 N. E. 916; Lewis v. King, 180 Ill. 259, 54 N. E. 330; Grubbs v. Leyendecker, 153 Ind. 348, 53 N. E. 940; Byrne v. Kernals, 55 Okla. 573, 155 P. 587; Tucker v. Tucker, 100 Tenn. 310, 45 S. W. 344; Magwire v. Riggin, 44 Mo. 512, 47 Mo. 532; Riggin v. Magwire, 15 Wall. (U. S.) 549, 21 L. Ed. 232; Weyer v. Sager, 21 Ohio Cir. Ct. 710, 12 O. C. D. 193; Little v. Bowen, 76 Va. 724; Stewart v. Tennant, 52 W. Va. 559, 44 S. E. 223.

The Missouri statute giving a widow a right to remain in the mansion house and plantation before assignment does not enable her to convey her unassigned dower right in other lands. Sell v. McAnaw, 138 Mo. 267, 39 S. W. 779.

42. Ritt v. Dodge, 20 R. I. 133, 37 A. 810.

43. Union Brewing Co. v. Meier, 163 Ill. 424, 45 N. E. 264; Hook v. Garfield Coal Co., 112 Ia. 210, 83 N. W. 963; Jackson v. O'Rorke, 71 Neb. 418, 98 N. W. 1068.

44. Johnston v. Loose, 201 Mich. 259, 167 N. W. 1021; Orchard v. Wright-Dalton-Bell-Anchor Store Co., 225 Mo. 414, 125 S. W. 486; Phillips v. Presson, 172 Mo. 24, 72 S. W. 501; Carey v. West, 139 Mo. 146, 40 S. W. 661; Sell v. McAnaw, 138 Mo. 267, 39 S. W. 779; Rohrer v. Oder, 124 Mo. 24, 27 S. W. 606.

45. Griffin v. Dunn, 79 Ark. 408, 96 S. W. 190; Grubbs v. Leyendecker, 153 Ind. 348, 53 N. E. 940.

by deed or other instrument operating by way of estoppel to pass her future estate.[46]

§ 1410. Rights to Convey After Assignment of Dower.

When dower has been duly assigned, she has an interest which she can assign or transfer,[47] or lease,[48] but her conveyance will pass only her interest.[49]

§ 1411. Actions Before and After Assignment of Dower.

Until assignment she is not a proper party to an action for damage to the husband's land,[50] nor has she any standing to attack for error a decree against her husband for its possession.[51] After assignment dower is subject to the rights of the dowress' creditors.[52]

§ 1412. Priorities as Against Liens.

Dower is junior to liens on the land existing prior to the attachment of dower,[53] either legal or equitable,[54] and to the lien of taxes.[55]

46. Lemon v. Lemon, 273 Mo. 484, 201 S. W. 103.

47. Maring v. Meeker, 263 Ill. 136, 105 N. E. 31; Phillips v. Williams, 130 Ky. 773, 113 S. W. 908; Hanna's Assignees v. Gay, 117 Ky. 695, 25 Ky. Law Rep. 1794, 78 S. W. 915; Kennedy v. Shaw, 43 Mich. 359, 55 N. W. 396; Barrier v. Young, 96 Miss. 160, 50 So. 559; Sell v. McAnaw, 158 Mo. 466, 59 S. W. 1003; Springsteen v. Springsteen, 172 App. Div. 605, 158 N. Y. S. 848; Smalley v. Paine (Tex.), 130 S. W. 739.

48. Blake v. Ashbrook, 91 Ill. App. 45; Martin v. Fletcher, 77 Ore. 408, 149 P. 895.

49. Landers v. Hayes, 196 Ala. 533, 72 So. 106; Standard Co. v. Young, 90 Conn. 133, 96 A. 932; Anglin v. Broadnax, 97 Miss. 514, 52 So. 865.

50. Baltimore & P. R. Co. v. Taylor, 6 App. (D. C.) 259; Cumberland Telephone & Telegraph Co. v. Foster, 117 Ky. 389, 25 Ky. Law Rep. 1465, 78 S. W. 150.

51. Smith v. Whitsett (Tenn.), 36 S. W. 1048.

52. Herring v. Keneipp (Ind.), 102 N. E. 834; Peebles v. Bunting, 103 Ia. 489, 73 N. W. 882; Tenbrook v. Jessup, 60 N. J. Eq. 234, 46 A. 516; Baer v. Ballingall, 37 Ore. 416, 61 P. 852.

53. Dunbar v. Dunbar, 254 Ill. 281, 98 N. E. 563; Ficklin's Adm'r v. Rixey, 89 Va. 832, 17 S. E. 325, 37 Am. St. R. 891.

54. Wilson v. Wilson, 32 Utah, 169, 89 P. 643.

55. Mulligan v. Mulligan, 161 Ky. 628, 171 S. W. 420; Dobschutz v. McAlevey (Mo.), 213 S. W. 82.

The dower interest in real estate attaches subject to the superior right of a purchase-money mortgage, and the widow is not entitled to assert it as against the prior claim based upon a purchase-money lien.[56]

§ 1413. Rights to Profits Before Assignment of Dower.

A widow is entitled to her proportionate share of the rents and profits accruing between her husband's death and the assignment of her dower,[57] especially after she has made demand for dower.[58] But it is at this day quite common for the heirs to pay the widow one-third of the net rents during her natural life, where the lands are not to be sold, or else purchase her share outright for a fixed sum, computed according to the annuity tables.[59]

§ 1414. Enjoining Waste.

The wife has during the life of her husband no right to interfere with its management and cannot even enjoin its waste, as her interest is inchoate merely.[60]

§ 1415. Rights in Timber and Improvements.

She cannot cut timber except for fuel and improvements,[61] or

56. Haynes v. Rolstin, 164 Ia. 180, 145 N. W. 336, 52 L. R. A. (N. S.) 540.

57. Mayo v. Arkansas Valley Trust Co. (Ark.), 209 S. W. 276; Cain's Adm'r v. Kentucky & Indiana Bridge & R. Co., 124 Ky. 449, 30 Ky. Law Rep. 593, 99 S. W. 297; Redmond v. Redmond's Adm'x, 28 Ky. Law Rep. 1176, 91 S. W. 260; *In re* Gorham (N. C.), 98 S. E. 717; Dunbar v. Dunbar, 168 Ill. App. 142, judgment modified, 254 Ill. 231, 98 N. E. 563.

58. Claussen v. Claussen, 279 Ill. 99, 116 N. E. 693

59. Kepcha v. Lowman, 249 Ill. 118, 94 N. E. 102; Cheney v. Pierce, 38 Vt. 515; Clark v. Tompkins, 1 S. C. (N. S.) 110; McLaughlin v. McLaughlin, 22 N. J. Eq. 505; Ludington v. Patton, 111 Wis. 208, 86 N. W. 571.

60. Ramsey v. Sullivan, 150 N. Y. Supp. 287 (where grantee of husband was digging oil wells. See, however, Brown v. Brown, 94 S. C. 492, 78 S. E. 447, where the grantee of the husband was enjoined by the wife who did not join in the conveyance from cutting timber on the land.

61. Garnett Smelting & Development

other legitimate purposes of husbandry.[62] Where she makes improvements without the consent of the heirs she cannot charge the husband's estate with the expense.[63]

§ 1416. Right to Contest Husband's Will.

The question sometimes arises whether a wife has a right to contest her husband's will. It seems clear that under most statutes she is not a party interested to contest where she would take the same share simply by claiming her statutory rights.[64] But where the widow does not take the same rights as if the testator died intestate, then she is a party interested and entitled to contest.[65]

A divorced wife may have a right to contest the will of her former husband if she has dower or statutory rights in his estate, but not otherwise.[66]

§ 1417. Effect of Conveyance by Heirs.

Any conveyance by the heirs must be subject to the widow's rights.[67]

Co. v. Watts, 140 Ala. 449, 37 So. 201; Louisville & N. R. Co. v. Hill, 115 Ala. 334, 22 So. 163; Daniels v. Charles, 172 Ky. 238, 189 S. W. 192.

62. Nashville Lumber Co. v. Barefield, 93 Ark. 353, 124 S. W. 758.

63. Casto v. Kintzel, 27 W. Va. 750.

64. *Re* Smith, 165 Ia. 614, 146 N. W. 836; McMasters v. Blair, 29 Pa. 298; McMechen v. McMechen, 17 W. Va. 683, 41 Am. R. 682.

65. Murphy v. Murphy, 23 Ky. L. Rep. 1460, 65 S. W. 165; Freeman v. Freeman, 61 W. Va. 682, 57 S. E. 292, 11 Ann. Cas. 1013.

It has been suggested that the widow's rights to contest are independent of her pecuniary interest as a decree of probate puts on her the burden of claiming her statutory rights even though she may know that the will is a forgery. The court remarks that "It is sufficient that the decree of the court deprives her of property to which she is entitled even though the law permits her to get an equivalent or a greater amount to which if the facts were known she would not have title. She may well say that she wants what belongs to her under the law, as applied to the facts and that she wants nothing the title to which is founded upon a falsehood." Dexter v. Codman, 148 Mass. 421, 19 N. E. 517.

66. *Re* Ensign, 103 N. Y. 284, 57 Am. R. 717, 8 N. E. 544. See *post*, § 1949.

67. Eakins v. Eakins, 112 Ky. 347, 23 Ky. Law Rep. 1637, 65 S. W. 811;

§ 1418. Rights of Husband's Creditors.

Generally dower rights are not subject to the claims of the husband's creditors,[68] especially where vesting before the debt was contracted,[69] or by a sale of his property to pay his debts,[70] though the wife is made a party to the action.[71] Where she releases her

McGowan v. Bailey, 179 Pa. St. 470, 36 A. 325; Bettis v. McNider, 137 Ala. 588, 34 So. 813, 97 Am. St. R. 59.

68. Mayo v. Arkansas Valley Trust Co. (Ark.), 209 S. W. 276; Arbaugh v. West, 127 Ark. 98, 192 S. W. 171; *In re* Tomlinson, 9 Del. Ch. 446, 81 A. 468; Green v. Estabrook, 168 Ind. 123, 79 N. E. 373; Bowers v. Lillis (Ind.), 115 N. E. 930; Staser v. Gaar, Scott & Co., 168 Ind. 131, 79 N. E. 404; Little v. Mundell (Ind.), 109 N. E. 227; Tetzloff v. May, 151 Ia. 441, 131 N. W. 647; Holt v. Hanley, 245 Mo. 352, 149 S. W. 1; Brown v. Tucker's Estate, 135 Mo. App. 598, 117 S. W. 96.

The same rule applies in North Carolina, where dower attaches only to land of which the husband dies seized or possessed. Winstead v. Winstead's Heirs, 2 N. C. 243; Atlantic Trust & Banking Co. v. Stone (N. C.), 97 S. E. 8.

When a husband conveys land to his wife through an intermediary, and the wife joins in the deed to the intermediary, she loses her inchoate right of dower and takes an estate in fee simple, subject to the right of a judgment creditor to have the conveyance treated as void as against his debt. Campbell v. Weber, 80 N. J. Eq. 553, 85 A. 225; Kaufman v. Heckman, 32 Ohio Cir. Ct. R. 282, affd., 92 N. E. 1116, 82 Ohio St. 453; *In re* Kligerman, 253 F. 778; Harris v. Powers, 129 Ga. 74, 58 S. E. 1038; *In re* Dalton's Estate (Ia.), 168 N. W. 332; Cray v. Lynn, 69 Pa. Super. 474.

69. G. J. Stewart & Co. v. Whicher, 168 Ia. 269, 150 N. W. 64; Kendall v. Kendall, 42 Ia. 464.

70. Callahan v. Nelson, 128 Ala. 671, 29 So. 555; Fields' Heirs v. Napier, 26 Ky. Law Rep. 240, 80 S. W. 1110; Kincaid v. Wilson, 20 Ky. Law Rep. 1364, 49 S. W. 333; Hogg v. Potter, 25 Ky. Law Rep. 492, 76 S. W. 35; McClanahan v. Porter, 10 Mo. 746; Grady v. McCorkle, 57 Mo. 172, 17 Am. R. 676; Davis v. Evans, 102 Mo. 164, 14 S. W. 875; McCrillis v. Thomas, 110 Mo. App. 699, 85 S. W. 673; Lynde v. Wakefield, 19 Mont. 23, 47 P. 5; Martin v. Abbott, 1 Neb. 59, 95 N. W. 356; Hanley v. Kubli (Ore.), 74 P. 224, relief gr. 75 P. 209; Mills v. Ritter, 197 Pa. St. 353, 47 A. 194.

In West Virginia, where it is held that a wife's inchoate dower is not a vested estate till the death of the husband, a sale of his land to pay his debts will bar dower. George v. Hess, 48 W. Va. 534, 37 S. E. 564. But if there is a surplus after paying debt, dower will attach to it. Bassell v. Caywood, 54 W. Va. 241, 46 S. E. 159, 66 L. R. A. 880.

71. Jewett v. Feldheiser, 68 Ohio St. 523, 67 N. E. 1072; Fast v. Um-

dower to her husband's grantee for a consideration paid by such grantee, the husband's creditors have no interest in such consideration, though it is more than the fair value of her right.[72] As against general creditors and heirs, if the husband's land is sold to pay a mortgage debt, she may be reimbursed for her dower therein out of the husband's personalty.[73]

§ 1419. Gross Sum in Lieu of Dower.

The widow is usually permitted to elect to take a gross sum in lieu of dower,[74] especially where the land cannot be divided without disadvantage.[75] The amount awarded is a charge on the land.[76] Where a dowress elects to take a gross sum in lieu of dower, the amount awarded should be estimated on her age and the value of the land at the time of the assignment.[77]

baugh, 22 Ohio Cir. Ct. R. 409, 12 O. C. D. 434.

72. Potter v. Stiles, 114 Ky. 132, 24 Ky. Law Rep. 1457, 71 S. W. 627.

73. Shobe v. Brinson, 148 Ind. 285, 47 N. E. 625; Lewis v. Watkins, 150 Ind. 108, 49 N. E. 944.

74. Under the Delaware statute a widow can have no money dower; the land is sold in partition proceedings, a proceeding to pay debts, or the like. *In re* Culver (Del.), 104 A. 784.

In Illinois a gross sum so awarded must be treated as real estate, and the wife cannot encroach on the principal. Wolfe v. Larison, 163 Ill. 552, 45 N. E. 112; Vanderpool v. Vanderpool, 163 Ky. 742, 174 S. W. 727; Brown v. Bronson, 35 Mich. 415; Freeman v. Ahearn, 64 App. Div. 509, 72 N. Y. S. 326; Gucker v. Kopp, 152 N. Y. S. 370; Sheffield v. Cooke, 39 R. I. 217, 98 A. 161; Geiger v. Geiger, 57 S. C. 521, 35 S. E. 1031; Slater v. Slater (Va.), 98 S. E. 7.

In West Virginia the consent of all parties interested is essential to permit the wife to elect to take a gross sum in lieu of dower. Jarrell v. French, 43 W. Va. 456, 27 S. E. 263; Sleeth v. Taylor (W. Va.), 95 S. E. 597.

75. Tarnow v. Carmichael, 82 Neb. 1, 116 N. W. 1031; Gibson v. Gibson, 93 S. C. 385, 76 S. E. 980; Elder v. McIntosh, 88 S. C. 286, 70 S. E. 807.

76. Lee v. James, 81 Ky. 443, 5 Ky. Law Rep. 492; Hogg v. Hensley, 100 Ky. 719, 19 Ky. Law Rep. 44, 39 S. W. 247; Nat. Bank of Lancaster v. Slavin's Trustee, 1 Ky. Law Rep. 315; Conlon v. Kelly, 199 N. Y. 43, 92 N. E. 109; Smith v. Danielson, 45 Pa. Super. Ct. 125; *In re* Hybart's Estate, 129 N. C. 130, 39 S. E. 779.

77. Johnson v. Gordon, 102 Ga. 350, 30 S. E. 507; Cassanave v. Brooke, 3 Bland (Md.), 267, note.

The present value of an inchoate right of dower is the difference be-

§ 1420. To Possession.

Possession or use of the husband's land cannot be enforced by the dowress till the right is consummate by the husband's death,[78] and according to some cases the dower cannot have possession against the heir till assignment.[79] Therefore till assignment she cannot maintain ejectment,[80] unless the statute gives her the right to possession before assignment.[81] Where she is left in possession, she may maintain it without assignment.[82]

§ 1421. Liability for Taxes.

Upon the death of the husband the widow's right of dower becomes consummate. It has ceased to be a contingency. But still it remains a mere right in the nature of a chose in action. The widow has the right to have dower assigned to her, but she has no estate until it is assigned. Presumably the tenant of the freehold is bound to pay the taxes until he assigns the dower. Heirs and devisees have the vested, existing estate. The widow, before dower assignment, is without estate.

It is well settled that the widow is under no obligation to pay taxes assessed against her husband's estate before the assignment of

tween the present value of an annuity to the wife for life and the value of a similar annuity depending upon the joint lives of herself and her husband. Brown v. Brown, 94 S. C. 492, 78 S. C. 447.

78. Bigoness v. Hibbard, 267 Ill. 301, 108 N. E. 294.

Thus she cannot, by reason of her inchoate dower right, restrain a third person from drilling her husband's land in his lifetime for coal and gas. Rumsey v. Sullivan, 150 N. Y. S. 287, 166 App. Div. 246, 148 N. Y. S. 1142.

79. Johnson v. Johnson, 106 Ark. 9, 152 S. W. 1017; Humphrey v. Gerard, 84 Conn. 216, 79 A. 57; Roe v. Doe, ex dem. Moore (Del.), 93 A. 373; Hunter v. Sanitary Dist. of Chicago, 179 Ill. App. 172; Taylor v. Meadows (N. C.), 85 S. E. 1; Fishel v. Browning, 145 N. C. 71, 58 S. E. 759; Fuchs v. Christie, 79 N. J. Law, 14, 74 A. 129; Lincoln Trust Co. v. Hutchinson, 65 Misc. 590, 120 N. Y. S. 811; Russel v. Tennant, 63 W. Va. 623, 60 S. E. 609; Hays v. Lemoine, 156 Ala. 465, 47 So. 97.

80. Bell v. Golding, 151 App. Div. 945, 136 N. Y. S. 278.

81. Brinkley v. Taylor, 111 Ark. 305, 163 S. W. 521; Lambert v. Hemler, 224 Ill. 254, 91 N. E. 435.

82. Harley v. Harley, 140 Wis. 282, 122 N. W. 761.

dower. Therefore, where the widow agrees to take the cash value of her dower interest in lieu of dower, taxes assessed before or after the death of her husband cannot be charged against her.[83]

§ 1422. Inheritance Taxes.

According to the weight of authority in this country dower rights passing to the widow under statutes taxing inheritances or interests passing under the "inheritance" [84] or "intestate" [85] laws are not subject to tax. The theory of the cases seems to be that dower is not an inheritance, but is an inchoate right of the wife in her husband's estate which is made simply vested on his death. There is a strong minority, however, which holds dower to be taxable under the inheritance tax.[86]

Under this latter view the inheritance tax applies to the statutory rights of the widow on her refusing to take under the will of her husband, although the tax applies only to property passing under the intestate laws. It is true that this right is not one strictly arising under the intestate laws, but is one acquired under the marriage relation, but these laws constitute the laws of descent in case of a wife's rights in her husband's estate.[87]

The suggestion that dower is vested in the widow by virtue of the contract of marriage, and passes by such contract and not by law, cannot be sustained. Dower is an estate arising and passing by operation of law. It is not a vested right nor an estate in land, nor is it in any sense based upon an implied contract arising out of the marriage. It is purely statutory, like the laws of devolution of

83. Underground Electric R. Co. v. Owsley (C. C. A.), 196 Fed. 278, 40 L. R. A. (N. S.) 609.

84. *Re* Bullen, 47 Utah, 96, 151 P. 533, L. R. A. 1916C, 670.

85. Kohny v. Dunbar, 21 Ida. 258, 121 P. 544, 39 L. R. A. (N. S.) 1107; *Re* Strahan, 93 Neb. 828, 142 N. W. 678; *Re* Green, 124 N. Y. Sup. 863; Avery's Estate, 34 Pa. 204; McDaniel v. Byrkett, 120 Ark. 295, 179 S. W. 491; Crenshaw v. Moore, 124 Tenn. 528, 137 S. W. 924, 34 L. R. A. (N.S.) 1161.

86. Billings v. People, 189 Ill. 472, 59 N. E. 798, 59 L. R. A. 807; *Re* Kennedy, 157 Cal. 517, 108 P. 280, 29 L. R. A. (N. S.) 428.

87. State v. Probate Court (Minn.), 163 N. W. 285, L. R. A. 1917F, 436.

all property upon death, and is therefore "property which passes by will or by the intestate laws of this State," within the terms of an inheritance tax, and is therefore subject to such a tax.[88]

Where the husband and wife are joint owners of certain property on his death, an inheritance tax may be levied on his interest passing to her.[89]

§ 1423. Inheritance Tax Where Widow Takes Under Will.

The dower interest of the widow is held not subject to the succession tax in some States, while it is in others, but even in these latter States, when the widow does not renounce the provisions of the will, but takes under it, she is then subject to the inheritance tax.[90]

Where a widow takes under the will of her husband in lieu of her dower interest she is subject to an inheritance tax on transfers by will, even in States which recognize the doctrine that the dower interest is property which exists inchoately during her husband's lifetime and passes to the widow regardless of the laws governing the disposition of the property by will. The argument is made on the other side that the receipt of real estate to the extent of the value of her dower interest is simply a consideration for the sale of her dower, and that she must be considered as simply having received her dower in this form. The logical answer is that it matters not what the motive of the transfer by will may be, whether to pay a debt or otherwise, if the devise be accepted the transfer is made by will and the State makes the tax depend on that circumstance.[91]

88. State v. Dunn, 174 N. C. 679, 94 S. E. 481, L. R. A. 1918F, 498.

89. *Re* McKelway, 221 N. Y. 15, 116 N. E. 348, L. R. A. 1917E, 1143.

90. *Re* Weiler, 122 N. Y. Supp. 608; Commonwealth's Appeal, 34 Pa. St. 204; Billings v. People, 189 Ill. 472, 59 N. E. 798, 59 L. R. A. 807, affd in 188 U. S. 97, 23 Sup. Ct. Rep. 272, 59 L. R. A. 807.

91. *Re* Riemann, 42 Misc. 648, 87 N. Y. Supp. 731; *Re* Gould, 156 N. Y. 423, 51 N. E. 287; Small's Estate, 151 Pa. 1, 25 A. 23, 28; *Re* Osgood

Cases dealing with the inheritance tax on dower interests are pertinent here, as such cases involve usually the nature of dower and a critical consideration of the effect of the modern statutes on dower interests.

(Utah), 173 P. 152, L. R. A. 1918E, 697; *contra, Re* Sanford, 91 Neb. 752, 137 N. W. 864, 45 L. R. A. (N. S.) 236.

CHAPTER IX.

HOW DOWER IS BARRED.

SECTION 1424. Divorce.
1425. By Agreement.
1426. Effect of Antenuptial Agreement on Widow's Allowance.
1427. Abandonment or Separation.
1428. Alienation of Inchoate Dower by Wife.
1429. Conveyance or Other Act by Husband.
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1432. Specific Performance of Husband's Sole Conveyance.
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1434. Conveyances in Fraud of Dower.
1435. Release.
1436. Release Contained in Conveyance Fraudulent as Against Creditors.
1437. Transfer of Personal Property.
1438. Adverse Possession, Dedication, Escheat, Limitations, Partition.
1439. Estoppel.
1440. Murder of Husband.

§ 1424. Divorce.

Dower may be barred in various ways. The wife's elopement, followed by adultery, was made a cause of forfeiture by an old English statute; and at this day it is generally enough to add that a divorce from bonds of matrimony, procured during the lifetime of the parties, puts an end to dower right, except so far as legislation may save it. The American policy is apparently to make the wife's misconduct the ground of forfeiture under the divorce laws,[92] but not independently of a divorce.[93] Only an

92. Daniels v. Taylor, 145 F. 169, 76 C. C. A. 139; McGrenra v. McGrenra, 7 Del. Ch. 432, 44 A. 816; Spade v. Hawkins (Ind.), 110 N. E. 1010; McQuinn v. McQuinn, 110 Ky. 321, 22 Ky. Law Rep. 2226, 61 S. W. 358.

To bar dower, the adultery need not be continuous (Bond v. Bond's Adm'r, 150 Ky. 389, 150 S. W. 363), and may be committed while living with her husband (Ferguson v. Ferguson, 153 Ky. 742, 156 S. W. 413.

93. Where a wife married again on

absolute divorce can bar dower.[94] Where a wife secures a divorce and is granted permanent alimony, her dower is generally barred,[95] but if she obtains the divorce for his fault she generally retains it,[96] even though obtained in another State for a cause not recognized in the State where the land lies,[97] but her right will be limited to land acquired prior to the divorce.[98] In some States divorce bars

the supposition that her husband had obtained a divorce, she was held not to have forfeited dower. Grober v. Clements, 71 Ark. 565, 76 S. W. 555.

In Illinois a divorced wife retains her dower if the decree is silent on the question. Kirkpatrick v. Kirkpatrick, 197 Ill. 144, 64 N. E. 267.

Under the Massachusetts statute a wife is not entitled to dower after divorce unless the husband dies before the decree becomes absolute. Seaman v. Harmon, 192 Mass. 5, 78 N. E. 301. See Hatch v. Small, 61 Kan. 242, 59 P. 362; Davis v. Davis Ex'r, 167 Wis. 328, 167 N.W. 819; Gallagher v. Gallagher, 101 Wis. 202, 77 N. W. 145; 1 Washb. 196, and cases cited; McKelvey v. McKelvey, 112 Mich. 274, 70 N. W. 582, 4 Det. Leg. N. 3.

94. Zimmerman v. Zimmerman, 242 Ill. 552, 90 N. E. 192; Killackey v. Killackey, 156 Mich. 127, 120 N. W. 680, 16 Det. Leg. N. 73; Bryon v. Bryon, 134 App. Div. 320, 119 N. Y. S. 41.

A decree for divorce granted in a proceeding in which no service except by publication was had upon the wife and of which she had no knowledge until after the decree, does not affect her rights to dower in property standing in the name of the husband. Barberton Sav. Bank Co. v. Belford, 32 Ohio Cir. Ct. R. 574. See Bromley v. McCall, 174 Ky. 415, 192 S. W. 507; Voke v. Platt, 48 Misc. 273, 96 N. Y. S. 725.

95. Harris v. Davis, 115 Ga. 950, 42 S. E. 266; Julier v. Julier, 62 Ohio St. 90, 56 N. E. 661, 78 Am. St. R. 697.

96. Appeal of Brown, 72 Conn. 148, 44 A. 22, 49 L. R. A. 144; Doyle v. Doyle, 268 Ill. 96, 108 N. E. 796; Schnepfe v. Schnepfe, 124 Md. 330, 92 A. 891; Davol v. Howlard, 14 Mass. 219; Snow v. Stevens, 15 Mass. 279; McAllister v. Dexter & P. R. Co., 106 Me. 371, 76 A. 891; Friend v. Friend, 53 Mich. 543, 19 N. W. 176, 51 Am. R. 161; Bowles v. Hoard, 71 Mich. 150, 39 N. W. 24; Linse v. Linse, 98 Minn. 243, 108 N. W. 8; Murray v. Scully, 259 Mo. 57, 167 S. W. 1017; White v. Ingram, 110 Mo. 474, 19 S. W. 827; Crenshaw v. Crenshaw, 276 Mo. 471, 208 S. W. 249; Scales v. Scales, 65 Mo. App. 292; Claussen v. Claussen, 279 Ill. 99, 116 N. E. 693; Allen v. Austin, 21 R. I. 254, 43 A. 69.

97. Van Blaricum v. Larson, 205 N. Y. 355, 98 N. E. 488.

98. Crenshaw v. Crenshaw, 276 Mo. 471, 208 S. W. 249; Nichols v. Park, 78 App. Div. 95, 79 N. Y. S. 547, 12 N. Y. Ann. Cas. 306; Kessinger v. Schrader, 79 Kan. 23, 98 P. 236.

dower without regard to the question of whose fault was the cause of it.[99]

§ 1425. By Agreement.

Dower may be barred in general by any valid contract or agreement clearly evincing an intention to that effect.[1] Since antenuptial agreements were void at common law, resort was had to equity to enforce such agreements when they barred dower.[2] To

99. McLaughlin v. McLaughlin (Ala.), 79 So. 354; Kendall v. Crenshaw, 116 Ark. 427, 173 S. W. 393; Dennis v. Harris (Ia.), 153 N. W. 343; Hamilton v. McNeill, 150 Ia. 476, 129 N. W. 480; O'Malley v. O'Malley, 46 Mont. 549, 129 P. 501.

1. Selleck v. Selleck, 8 Conn. 85; Colbert v. Rings, 231 Ill. 404, 83 N. E. 274; Dunlop v. Lamb, 182 Ill. 319, 55 N. E. 354; Edwards v. Edwards, 267 Ill. 111, 107 N. E. 847; Rotes v. Phelps, 194 Ill. App. 73; Craig v. Craig, 90 Ind. 215; Glass v. Davis, 118 Ind. 593, 21 N. E. 319; Kohl v. Frederick, 115 Ia. 517, 88 N. W. 1055; Nesmith v. Platt, 137 Ia. 292, 114 N. W. 1053; Grider v. Eubanks, 12 Bush (Ky.), 510; Biggerstaff's Ex'rs v. Biggerstaff's Adm'r, 95 Ky. 154, 15 Ky. Law Rep. 725, 23 S. W. 965; Hill v. Boland, 125 Md. 113, 93 A. 395; Vincent v. Spooner, 2 Cush. (Mass.) 467; Dakin v. Dakin, 97 Mich. 284, 56 N. W. 562; Hockenberry v. Donovan, 170 Mich. 370, 136 N. W. 389; Crenshaw v. Crenshaw (Mo.), 208 S. W. 249; *In re* Rieger's Estate, 81 Neb. 58, 116 N. W. 953; Rieger v. Schaible, 81 Neb. 33, 115 N. W. 560; *In re* Scott, 156 N. Y. S. 960; *In re* McVay's Estate, 260 Pa. 83, 103 A. 505; Taylor v. Moore, 2 Rand. (Va.) 563; Chaffee v. Chaffee, 70 Vt. 231, 40 A. 247. See Merki v. Merki, 212 Ill. 121, 72 N. E. 9; Zachmann v. Zachmann, 201 Ill. 380, 66 N. E. 256, 94 Am. St. R. 180; Shelton v. Sears, 187 Mass. 455, 73 N. E. 666; Roberts v. Walker, 101 Mo. 597, 14 S. W. 631; Land v. Shipp, 98 Va. 284, 36 S. E. 391, 50 L. R. A. 560.

In Nebraska dower can be barred by antenuptial agreement only in the manner provided by the statute. Fellers v. Fellers, 54 Neb. 595, 74 N. W. 1077.

At common law the essentials of a jointure were that it must consist of an estate or interest in land taking effect in possession or profit immediately on the death of the husband, and must be made in satisfaction of dower and so appear in the deed. It is an absolute bar to dower only where made before marriage, and if made after marriage merely puts the wife to an election between its provisions and her dower. Land v. Shipp, 98 Va. 284, 36 S. E. 391, 50 L. R. A. 560.

2. Schnepfe v. Schnepfe, 124 Md. 330, 92 A. 891. A mere covenant in a marriage settlement that the wife will not claim dower has been held not to bar dower where the settlement is antenuptial, because it is a release of a right not then in exist-

bar dower an instrument intended as a jointure must express such an intention on its face,[3] or be necessarily implied from its terms,[4] or be plainly inconsistent with an intent to claim dower.[5] It must not be unconscionable,[6] or induced by fraud,[7] or undue influence,[8] or be intended to promote a separation.[9] It must also make provision for the life of the widow and not merely for her widowhood,[10] and must be supported by an adequate consideration,[11] and

ence, the remedy being by way of action on the covenant. Hastings v. Dickinson, 7 Mass. 153, 5 Am. Dec. 34.

3. King v. King, 184 Mo. 99, 82 S. W. 101; Rice v. Waddill, 168 Mo. 99, 67 S. W. 605; Lowe v. Lowe, 163 Mo. App. 209, 146 S. W. 100; Coulter v. Lyda, 102 Mo. App. 401, 76 S. W. 720.

4. Morgan v. Sparks, 32 Ky. Law Rep. 1196, 108 S. W. 233; Bramer v. Bramer (W. Va.), 99 S. E. 329; Fraser v. Stokes, 112 Va. 335, 71 S. E. 545.

5. Cowdrey v. Cowdrey, 72 N. J. Eq. 951, 67 A. 111.

6. Kennedy v. Kennedy, 150 Ind. 636, 50 N. E. 756; Bechtel v. Barton, 147 Mich. 318, 110 N. W. 935, 13 Det. Leg. N. 1047; *In re* Pulling's Estate, 93 Mich. 274, 52 N. Y. 1116; Cummings v. Cummings, 25 R. I. 528, 57 A. 302; Kitts v. Kitts, 136 Tenn. 314, 189 S. W. 375.

7. Rankin v. Schiereck (Ia.), 147 N. W. 180; Forwood v. Forwood, 86 Ky. 114, 9 Ky. Law Rep. 415, 5 S. W. 361.

Failure of a husband to disclose fairly the nature and extent of his property will amount to fraud. Early v. Early (Ky.), 207 S. W. 466; Hannon v. Hannon, 46 Mont. 253, 127 P. 466.

8. Hinkle v. Hinkle, 34 W. Va. 142, 11 S. E. 993.

9. Bowers v. Hutchinson, 67 Ark. 15, 53 S. W. 399; Birch v. Anthony, 109 Ga. 349, 34 S. E. 561, 77 Am. St. R. 379; Martin v. Farmers' Loan & Trust Co. (Ia.), 163 N. W. 361; Bechtel v. Barton, 147 Mich. 318, 110 N. W. 935, 13 Det. Leg. N. 1047; *In re* Kaiser's Estate, 14 Pa. Super. 155; Moon v. Bruce, 63 S. C. 126, 40 S. E. 1030.

10. Moran v. Stewart, 173 Mo. 207, 73 S. W. 177.

11. Redwine's Ex'r v. Redwine, 160 Ky. 282, 169 S. W. 864; *In re* Fennell's Estate, 207 Pa. 309, 56 A. 875.

An antenuptial contract in consideration of marriage and the release by each party of all interest in the property of the other is based on a sufficient consideration when each is the owner of property in which the other would acquire an interest by reason of the marriage but for the antenuptial agreement, and is sufficient, when equitable in its terms and entered into in good faith, to constitute an equitable bar to dower. Rieger v. Schaible, 81 Neb. 33, 115 N. W. 560, rehearing denied, 81 Neb. 58, 116 N. W. 953.

must make an adequate provision for the widow in lieu of dower.[12] A wife may also bar her dower by a postnuptial contract with [13] or conveyance to him,[14] if on sufficient consideration.[15]

§ 1426. Effect of Antenuptial Agreement on Widow's Allowance.

Where a statute provides for a year's support to the widow out of her husband's estate this right is not lost by an antenuptial agreement by which the wife relinquishes all rights to support out of his estate. It is held that it is a matter of public concern that the wife and children shall be supported in a proper case, and therefore no provision in an antenuptial contract, no matter how fair and reasonable, will bind the wife to cut herself off from the right of support in a proper case. Of course the circumstances including the provisions of the contract may be considered in determining whether an allowance should be made; but if, in the particular case, the court finds an allowance to be proper, no relinquishment or waiver in the antenuptial contract can be relied upon to defeat the right to it.[16]

§ 1427. Abandonment or Separation.

In some cases it is held that dower is barred by the wife's volun-

12. Dickason v. English, 272 Ill. 368, 112 N. E. 65.

13. Carling v. Peebles, 215 Ill. 96, 74 N. E. 87; Stokes v. Stokes, 240 Ill. 330, 88 N. E. 829; Swartz v. Andrews, 137 Ia. 261, 114 N. W. 888.

In Iowa a contract to bar dower is ineffective, as the statute provides that neither spouse shall have an interest in the property of the other which may be the subject of contract between them. Miller v. Miller, 104 Ia. 186, 73 N. W. 484; Delaney v. Manshum, 146 Mich. 525, 109 N. W. 1051, 13 Det. Leg. N. 876; Hogg v. Lindridge, 135 N. Y. S. 928, 151 App. Div. 513; Beaty v. Richardson, 56 S. C. 173, 34 S. E. 73, 46 L. R. A. 517; Baker v. Syfritt, 147 Ia. 49, 125 N. W. 998.

14. Fisher v. Koontz, 110 Ia. 498, 80 N. W. 551; Schlesinger v. Klinger, 98 N. Y. S. 545, 112 App. Div. 853; see *contra*, Land v. Shipp, 98 Va. 284, 36 S. E. 391, 50 L. R. A. 560.

15. McGaugh v. Mathis, 131 Ark. 221, 198 S. W. 1147; Friebe v. Elder, 103 N. E. 429, judgment affirmed, 181 Ind. 597, 105 N. E. 151; La Plant v. Lester, 150 Mich. 336, 113 N. W. 1115, 14 Det. Leg. N. 643; Tate v. Tate, 10 O. C. D. 321.

16. *Re* Johnson, 154 Ia. 118, 134 N. W. 553, 37 L. R. A. (N. S.) 875.

tary abandonment of her husband,[17] but not by a separation by agreement,[18] or where she leaves him with just cause,[19]

§ 1428. Alienation of Inchoate Dower by Wife.

The wife's inchoate dower before death of the husband is not assignable to a third party, as it is generally considered against public policy to allow the fee and this inchoate right to be separated.[20] That interest is of such an intangible nature that it cannot be conveyed at all, apart from the land, either by her sole deed or by a joint deed, if the husband retains his interest in the land.[21]

§ 1429. Conveyance or Other Act by Husband.

The husband cannot bar dower either by his sole conveyance or mortgage,[22] or by his sole deed or other similar instrument of

17. Kantor v. Bloom, 90 Conn. 210, 96 A. 974; Wilson v. Craig, 175 Mo. 362, 75 S. W. 419; Lyons v. Lyons, 101 Mo. App. 494, 74 S. W. 467; Hicks v. Hicks, 142 N. C. 231, 55 S. E. 106.

18. Kantor v. Bloom, 90 Conn. 210, 96 A. 974; Norton v. Tufts, 19 Utah, 470, 57 P. 409.

19. Stuart v. Neely, 50 W. Va. 508, 40 S. E. 441.

20. Davenport v. Gwilliams, 133 Ind. 142, 31 N. E. 790, 22 L. R. A. 244; McGlothlin v. Pollard, 81 Ind. 228; Geisendorff v. Cobbs, 47 Ind. App. 573, 94 N. E. 236; Howlett v. Dilts, 4 Ind. App. 23, 30 N. E. 313; Weaver v. Michello, 193 Mich. 572, 160 N. W. 612.

The Missouri statute empowering a wife to transfer unassigned dower in her deceased husband's lands applies only to dower made consummate by his death. Brannock v. Magoon, 216 Mo. 722, 116 S. W. 500; Mason v. Mason, 140 Mass. 63; Hill v. Boland, 125 Md. 113, 93 A. 395.

21. Buckel v. Auer (Ind. App.), 120 N. E. 437.

22. Yarbrough v. Yarbrough (Ala.), 75 So. 932; Lowe v. Walker, 77 Ark. 103, 91 S. W. 22; Sheckells v. Sheckells, 42 App. D. C. 131; Pirkle v. Equitable Mortg. Co., 99 Ga. 524, 28 S. E. 34; McLanahan v. Griffin, 168 Ill. 31, 48 N. E. 315; Wachstetter v. Johnson (Ind.), 108 N. E. 624, 990; Frain v. Burgett, 152 Ind. 55, 50 N. E. 873, 52 N. E. 395; Overturf v. Martin, 170 Ind. 308, 84 N. E. 531; Keener v. Grubb, 44 Ind. App. 564, 89 N. E. 896; Stevens v. Wooderson, 38 Ind. App. 617, 78 N. E. 681; Sherod v. Ewell, 104 Ia. 253, 73 N. W. 493; Hyatt v. O'Connell, 130 Ia. 567, 107 N. W. 599; Purcell v. Lang, 108 Ia. 198, 78 N. W. 1005; Hyatt v. O'Connell, 130 Ia. 567, 107 N. W. 599; Warner v. Trustees of Norwegian Cemetery Ass'n,

trust,[23] or by stipulation in his sole deed concerning her dower right,[24] or by his contract of sale, [25] or to give a mortgage,[26] or to

139 Ia. 115, 117 N. W. 39; City Bank & Trust Co. of Hopkinsville v. Planters' Bank & Trust Co. of Hopkinsville, 176 Ky. 500, 195 S. W. 1124; Smith v. American Tobacco Co., 149 Ky. 591, 149 S. W. 927; Robinson v. Robinson, 11 Bush (Ky.), 174; Eversole v. First Nat. Bank (Ky.), 118 S. W. 961; Woman's Club Corp. v. Reed, 111 Ky. 806, 23 Ky. Law Rep. 1346, 64 S. W. 739; Harris v. Langford, 26 Ky. Law Rep. 1096, 83 S. W. 566; Furnish's Adm'r v. Lilly, 27 Ky. Law Rep. 226, 84 S. W. 734; Downey v. King, 201 Mass. 59, 87 N. E. 468; Bonfoey v. Bonfoey, 100 Mich. 82, 58 N. W. 620; Killackey v. Killackey, 156 Minn. 127, 120 N. W. 680, 16 Det. Leg. N. 73; Stromme v. Rieck, 107 Minn. 177, 119 N. W. 948; Hall v. Smith, 103 Mo. 289, 15 S. W. 621; Bartlett v. Tinsley, 175 Mo. 319, 75 S. W. 143; Coberly v. Coberly, 189 Mo. 1, 87 S. W. 957; Pollman v. Schaper, 258 Mo. 710, 167 S. W. 953; Murray v. Scully, 259 Mo. 57, 167 S. W. 1017; Vantage Mining Co. v. Baker, 170 Mo. App. 457, 155 S. W. 466; Lynde v. Wakefield, 19 Mont. 23, 47 P. 5; Ostheimer v. Single, 73 N. J. Eq. 539, 68 A. 231; Adams v. Stewart, 156 N. Y. S. 135, 170 App. Div. 445; Reade v. Continental Trust Co., 63 N. Y. S. 395, 49 App. Div. 400; Anderson v. McNeely, 105 N. Y. S. 278, 120 App. Div. 676; Villone v. Feinstein, 116 N. Y. S. 384, 132 App. Div. 31; Fast v. Umbaugh, 22 Ohio Cir. Ct. 409, 12 O. C. D. 434; Griffith v. Griffith, 74 Ore. 225, 145 P. 270; Shupe v. Rainey, 255 Pa. 432, 100 A. 138; Fisher v. Fisher, 89 S. C. 175, 71 S. E. 863; Gainey v. Anderson, 87 S. C. 47, 68 S. E. 888; Gaffney v. Jefferies, 59 S. C. 565, 38 S. E. 216, 53 L. R. A. 918, 82 Am. St. R. 860; Miller v. Farmers' Bank, 49 S. C. 427, 27 S. E. 514, 61 Am. St. R. 821; Dowling v. De Witt, 96 S. C. 435, 81 S. E. 173; Watkins v. Justice (S. C.), 98 S. E. 193; Land v. Shipp, 98 Va. 284, 36 S. E. 391, 50 L. R. A. 560; Shakleford v. Morrill, 142 N. C. 221, 55 S. E. 82; Rhea v. Rawls, 131 N. C. 453, 42 S. E. 900.

In Louisiana a wife has a tacit mortgage for her dower in any land sold by her husband. Nadaud v. Mitchell, 6 Mart. O. S. (La.) 688; McAllister v. Dexter & P. R. Co., 106 Me. 371, 76 A. 891.

By direct provision of Rev. St. (Me.), ch. 77, § 17, the statutory interest in her husband's realty of a wife who refuses to release such interest by joinder with her husband in his deed may be determined and the value ordered paid. Whiting v. Whiting 114 Me. 382, 96 A. 500.

23. Fraser v. Stokes, 112 Va. 335, 71 S. E. 545.

24. Clinchfield Coal Co. v. Sutherland, 114 Va. 20, 75 S. E. 765.

25. Bride v. Reeves, 36 App. D. C. 476; Rankin v. Rankin, 111 Ill. App. 403; Eastwood v. Crane, 125 Ia. 707, 101 N. W. 481; Rockland-Rockport Lime Co. v. Leary, 203 N. Y. 469, 97 N. E. 43.

26. Meixel v. Meixel, 146 N. Y. S. 587, 161 App. Div. 518.

secure the discharge of a mortgage,[27] or by his conveyance to his mortgagee with intent to extinguish the mortgage,[28] or by his assignment for the benefit of creditors,[29] or by his will,[30] or by his bigamous marriage with another woman.[31] The wife's right is not affected by such a conveyance even though the grantee had no notice of the wife's right,[32] or even though the husband falsely recites in his deed that he is unmarried,[33] or even though another woman joins the grantor in the deed as his wife,[34] or even though the husband spends the money received for the land in paying family expenses,[35] unless she permits the sale with actual or constructive knowledge of her husband's representation that he is unmarried.[36]

§ 1430. Deeds to Devisees in Satisfaction of Will.

Where the testator before his death executed deeds to devisees

27. Evans v. Pegues, 102 S. C. 186, 86 S. E. 480.

28. Gainey v. Anderson, 87 S. C. 47, 68 S. E. 888.

29. *In re* Hays, 181 F. 674; Hanna's Assignees v. Gay, 117 Ky. 695, 25 Ky. Law Rep. 1794, 78 S. W. 915; Trimble v. Hunt, 15 Ky. Law Rep. 707, 25 S. W. 108; Conner v. Conner's Assignee, 10 Ky. Law Rep. 317; Briggs v. Sanford, 219 Mass. 572, 107 N. E. 436; McFadden v. McFadden, 32 Pa. Super. 534. See *contra*, Merrill v. Security Trust Co., 71 Minn. 61, 73 N. W. 640, 70 Am. St. R. 312.

30. Dunshee v. Dunshee, 263 Ill. 188, 104 N. E. 1100; Mettler v. Warner, 243 Ill. 600; 90 N. E. 1099; McCann v. Daly, 168 Ill. App. 287; Shipley v. Mercantile Trust & Deposit Co., 102 Md. 649, 62 A. 814.

A husband cannot by gift *causa mortis* deprive his wife of her dower rights in his personalty, where the gift was made merely to effectuate his testamentary intention to pass the property free from any claims of the wife. Crawfordsville Trust Co. v. Ramsey, 55 Ind. App. 40, 100 N. E. 1049.

31. Estes v. Merrill (Ark.), 181 S. W. 136.

32. Wachstetter v. Johnson (Ind.), 108 N. 624, 990; Hilton v. Sloan, 37 Utah, 359, 108 P. 689.

33. Haller v. Hawkins, 245 Ill. 492, 92 N. E. 299; Chase v. Angell, 148 Mich. 1, 108 N. W. 1105, 13 Det Leg. N. 616.

34. Smith v. Fuller, 138 Ia. 91, 115 N. W. 912.

35. Haller v. Hawkins, 245 Ill. 492, 92 N. E. 299.

36. Hilton v. Sloan, 37 Utah, 359, 108 P. 689; Lidster v. Poole, 122 Ill. App. 227.

giving them property devised to them by his will these deeds are in satisfaction of the will, and the grantees take under the deeds. The widow must be given in satisfaction of her dower other property if enough other property in value is available for that purpose.[37]

§ 1431. When Husband's Sole Conveyance Effective.

In some States a husband's deed of land which is his separate property passes a good title without the assent of the wife, if not a homestead.[38] A purchase money mortgage by a husband is valid without the assent of the wife.[39] When the wife does join she is a joint obligee.[40] The joinder of wives of *cestuis que trust* is not necessary where the *cestuis que trust* merely join a trustee's deed in order to agree to indemnify him and not to perfect title.[41] A wife's dower interest cannot be alienated without her consent.[42]

Where spouses execute a deed of trust directing the proceeds of land to be paid to them or their representatives, it was held that no estate by the entireties was created, and the rights of the parties after the death of the husband were to be determined according to the rights in the land when the deed was made.[43]

37. Rice v. Rice, 147 Ia. 1, 125 N. W. 826, 34 L. R. A. (N. S.) 917.

38. Lowe v. Walker, 77 Ark. 103, 91 S. W. 22; Noble v. Morris, 24 Ind. 478; Goodman v. Malcolm, 9 Kan. App. 887, 58 P. 564; First Nat. Bank v. Root, 20 Ky. Law Rep. 1863, 50 S. W. 16; Wilson v. Wilson, 83 Neb. 562, 120 N. W. 147, modified on rehearing, 85 Neb. 167, 122 N. W. 856. See Cawfield v. Owens, 129 N. C. 286, 40 S. E. 62; Driver v. White (Tenn.), 51 S. W. 994; Wright v. Barnett (Tex.), 48 S. W. 1096; Hughes v. Hughes (Tex. Civ. App.), 170 S. W. 947.

39. Stanley v. Johnson, 113 Ala. 344, 21 So. 823; Taylor v. Mathews, 53 Fla. 776, 44 So. 146; Leonard v. Binford, 122 Ind. 200, 23 N. E. 704.

40. Allen v. South Penn. Oil Co., 72 W. Va. 155, 77 S. E. 905.

41. Lockville Power Corporation v. Carolina Power & Light Co., 168 N. C. 219, 84 S. E. 398.

42. Unger v. Mellinger, 37 Ind. App. 639, 77 N. E. 814, 117 Am. St. R. 348; Williams v. Wessels, 94 Kan. 71, 145 P. 856; Kernan v. Carter, — Md. —, 104 A. 530; McCormick v. Brown, 97 Neb. 545, 150 N. W. 827; Horton v. Okanogan County, 98 Wash. 626, 168 P. 479.

43. Bailey v. Bailey, 172 N. C. 671, 90 S. E. 803.

§ 1432. Specific Performance of Husband's Sole Conveyance.

Where the husband has contracted to convey without obtaining the signature of his wife he may be forced in equity to convey his own fee, leaving the dower in the wife separated from the fee.[44] If the husband, after conveying alone without the joinder of his wife, later makes a conveyance to another in which his wife joins, the second grantee taking with notice of the prior conveyance may be forced to convey the fee to the first grantee, deducting compensation for the value of the dower according to the theory of probabilities.[45]

Where the court orders specific performance of a contract to convey land which is not signed by the wife of the vendor, and where the vendee did not know that the vendor was married at the time the contract was signed, the vendee is entitled to have diminution of the purchase price by the present value of the wife's dower rights.[46]

§ 1433. Effect of Joinder by Wife in Husband's Deed.

A release of dower and homestead in a deed will not pass any other interest the wife may have,[47] nor will her joinder in a power of attorney to convey his land have that effect,[48] but where the estate was acquired and improved with her funds it will pass all her interest.[49] A release of dower and homestead in a mortgage does not affect the wife's right under a prior mortgage.[50] In some

44. Davis v. Parker, 14 Allen (Mass.), 94.

45. Williams v. Wessels, 94 Kan. 71, 145 P. 856; Mansfield v. Hogdon, 147 Mass. 304, 17 N. E. 544; Saldutti v. Flynn, 72 N. J. Eq. 157, 65 A. 246.

46. Tebeau v. Ridge, 261 Mo. 547, 170 S. W. 871, L. R. A. 1915C, 367 (showing conflict of authority on this question).

47. Erickson v. Johnson, 152 N. W. 575; Kidd v. Bell (Ky. 1909), 122 S. W. 232; Kitchell v. Mudgett, 37 Mich. 81; Hauser v. Murray, 256 Mo. 58, 165 S. W. 376; Adamson v. Souder, 205 Pa. 498, 55 A. 182. See Heth v. Richmond, F. & P. R. Co. 4 Gratt. (Va.) 482, 50 Am. Dec. 88.

48. Armor v. Frey, 253 Mo. 447, 161 S. W. 829.

49. Stell v. Stell, 130 Ark. 591, 196 S. W. 814.

50. Hewett v. Suits, 47 N. Y. S. 1038, 22 App. Div. 210.

States a wife has no vested interest in her husband's lands,[51] and therefore the consideration of a release of dower and homestead by a wife is *prima facie* presumed to be the consideration of the deed.[52] In some States the joinder of a wife as grantor conveys all her interest, including dower and homestead,[53] the presumption from her joinder in the granting clause being that the title is joint, and that she does not join merely to release dower and homestead.[54] Under the Alabama statute rendering the wife not liable on warwanties in a deed executed with her husband, title acquired by her after executing such a deed, when the spouses had no title, does not insure to the grantee.[55] Under the Illinois Married Women's Act a wife is not bound by warranties in a deed wherein she joins with her husband merely to release dower and homestead.[56] Under the New York statute a mortgage executed by a husband, and describing the whole estate without reservation, passes the whole estate of the wife where she joins in it, though the spouses have separate undivided interests in the property.[57]

§ 1434. Conveyances in Fraud of Dower.

A voluntary antenuptial conveyance by the husband is usually held fraudulent.[58] The rule applies to antenuptial conveyances by either spouse, if intended to defeat the rights of the other.[59]

51. Murray v. Cazier, 23 Ind. App. 600, 53 N. E. 476.

52. Jarboe v. Severin, 85 Ind. 496.

53. First Nat. Bank v. Root, 20 Ky. Law Rep. 1863, 50 S. W. 16.

54. McKenzie v. Houston, 130 N. C. 566, 41 S. E. 780.

55. Prior v. Loeb, 119 Ala. 450, 24 So. 714.

56. Granath v. Johnson, 90 Ill. App. 308.

57. Snyder v. Ash, 51 N. Y. S. 772, 30 App. Div. 183.

58. Redman v. Churchill, 230 Mass. 415, 119 N. E. 953; Grover v. Clover, — Colo. —, 169 P. 578; Jones v. Jones, 281 Ill. 595, 117 N. E. 1013 Dunbar v. Dunbar, 254 Ill. 281, 98 N. E. 563; Ross v. Perkins, 93 Kan. 579, 144 P. 1004; Brinkley v. Brinkley, 128 N. C. 503, 39 S. E. 38; Hanson v. McCarthy, 152 Wis. 131, 139 N. W. 720; Deke v. Huenkemeier, 260 Ill. 131, 102 N. E. 1059.

59. Deke v. Huenkemeier, — Ill. —, 124 N. E. 381 Gregory v. Winston's Adm'r (Va. 1873), 23 Grat. 102; West v. West, 179 S. W. 1017;

The rule applies to personal property.[60] The wife stands as a creditor in such cases.[61] Such an antenuptial transfer must be without the wife's knowledge.

In general, an antenuptial transfer, to be fraudulent as to the wife, must be without her knowledge.[62] It will not be fraudulent where the husband retains property sufficient to secure her rights,[63] or where he provides for her in his will in a manner satisfactory to her at the time of the conveyance.[64] It is usually fraudulent where the transfer is of the bulk of the husband's property.[65] A conveyance made by a man intending to marry, with an intention to defeat the rights of the intended wife, is fraudulent as to her, though he had not then selected her.[66] It is otherwise where there is no intention to defraud,[67] or if the transfer was for value, and

Longworth v. Longworth, 128 N. Y. S. 1064; Lewis v. Davis, — Ala. —, 73 So. 419.

60. Poole v. Poole, 96 Kan. 84, 150 P. 592; Smith v. Corey, 125 Minn. 190, 145 N. W. 1067.

61. Donaldson v. Donaldson, 249 Mo. 228, 155 S. W. 791.

62. Beechley v. Beechley, 134 Ia. 75, 108 N. W. 762, 120 Am. St. R. 412, 9 L. R. A. N. S. 955; Collins v. Collins, 98 Md. 473, 57 A. 597, 103 Am. St. R. 408; Hach v. Rollins, 158 Mo. 182, 59 S. W. 232; Bell v. Dufur, 142 Ia. 701, 121 N. W. 500.

Where a woman holding a judgment for breach of promise sued to set aside a conveyance by the defendant, but discontinued and married him, her knowledge of the transaction was held not to prevent her from maintaining a second action after his death to set the conveyance side. Cook v. Lee, 72 N. H. 569, 58 A. 511.

It has been held that an antenuptial deed of all a husband's property to trustees to pay him the income for life and after his death to others of whom the wife was not one, cannot be set aside during his life, but may be avoided at his death so that she may share in it. Potter v. Fidelity Ins. Trust & Safe Deposit Co., 199 Pa. 366, 49 A. 86.

63. Goodman v. Malcom, 5 Kan. App. 285, 48 P. 439; Kessler v. Kessler, 2 Cal. App. 509, 83 P. 257.

64. Trabbic v. Trabbic, 142 Mich. 387, 105 N. W. 876, 12 Det. Leg. N. 782.

65. Wilson v. Wilson, 23 Ky. Law Rep. 1229, 64 S. W. 981.

66. Beechley v. Beechley, 134 Ia. 75, 108 N. W. 762, 120 Am. St. R. 412, 9 L. R. A. (N. S.) 955.

A transfer by a husband to defeat the right of the wife to maintenance, even before marriage, is fraudulent as to her, where there was an agreement to marry, cohabitation and pregnancy. Murray v. Murray, 115 Cal. 266, 47 P. 37. But see Alkire v. Alkire, 134 Ind. 350.

67. Arnegard v. Arnegard, 7 N.

if the grantee did not know of the fraud.[68] Where the property has been conveyed by the husband's vendee to a *bona fide* purchaser for value, she may have damages of the original vendee.[69] A wife may have relief where her husband, in fraud of her dower right, conveys his property,[70] or causes title to be taken to it in another name,[71] or causes a mortgage to be foreclosed,[72] or causes a fraudulent judgment to be rendered against him under which the land is sold,[73] even though the grantee is not a party to the fraud,[74] and

D. 475, 75 N. W. 797, 41 L. R. A. 258; *In re* Coleman's Estate, 193 Pa. St. 605, 44 A. 1085.

68. Allen v. Allen, 213 Mass. 29, 99 N. E. 462.

69. Wellington v. St. Paul, M. & M. Ry. Co., 123 Minn. 483, 144 N. W. 222.

70 Houseman v. Grossman, 177 Pa. St. 453, 35 A. 736; Nelson v. Brown, 164 Ala. 397, 51 So. 360.

The rule applies to a fraudulent conveyance of personal property where the statute gives the wife rights in the nature of dower in her husband's personalty. Smith v. Lamb, 87 Ark. 344, 112 S. W. 884; Roberts v. Roberts, 131 Ark. 90, 198 S. W. 697; Smith v. Smith, 24 Colo. 527, 52 P. 790; 65 Am. St. R. 251; Deke v. Huenkemeier, — Ill. —, 124 N. E. 381; Roberts v. Goodin, — Ill. —, 123 N. E. 559 Jarvis v. Jarivs, — Ill. —, 122 N. E. 121; Clark v. Clark, 183 Ill. 448, 56 N. E. 82, 75 Am. St. R. 115; Higgins v. Higgins, 219 Ill. 146, 76 N. E. 86, 109 Am. St. R. 316; Bookout v. Bookout, 150 Ind. 63, 49 N. E. 824, 65 Am. St. R. 350; Willis v. Robertson, 121 Ia. 380, 96 N. W. 900; Wallace v. Wallace, 137 Ia. 169, 114 N. W. 913; McKelvey v. McKelvey, 79 Kan. 82, 99 P. 238; Lockett's Adm'r v. James, 8 Bush (Ky.), 28; Wiley v. Wiley, 178 Ky. 501, 199 S. W. 47; Collings v. Collings, 29 Ky. Law Rep. 51, 92 S. W. 577; Connelly v. Ford, — Mich. —, 168 N. W. 411; Rice v. Waddill, 168 Mo. 99, 67 S. W. 605; Weller v. Collier, — Mo. —, 199 S. W. 974; Hach v. Rollins, 158 Mo. 182, 59 S. W. 232; Waterhouse v. Waterhouse, 206 Pa. 433, 55 A. 1067; *In re* Snayberger's Estate, 62 Pa. Super. 390; McAulay v. McAulay, 96 S. C. 86, 79 S. E. 785; Wilson v. Wilson, 32 Utah, 169, 89 P. 643; Jenkins v. Rhodes, 106 Va. 564, 56 S. E. 332; James v. Upton, 96 Va. 296, 31 S. E. 255; Goff v. Goff, 60 W. Va. 9, 53 S. E. 769. See Rickett v. Bolton, 173 Ky. 739, 191 S. W. 471; Turner v. Kuehnle, 70 N. J. Eq. 61, 62 A. 327.

71. Griffith v. Griffith, 74 Ore. 225, 145 P. 270; Asam v. Asam, 239 Pa. 295, 86 A. 871.

72. Turner v. Kuehnle, 70 N. J. Eq. 61, 62 A. 327.

73. McKelvey v. McKelvey, 75 Kan. 325, 89 P. 663.

74. Higgins v. Higgins, 219 Ill. 146, 76 N. E. 86.

even though there are no actual misrepresentations.[75] Such relief may be had in his lifetime,[76] even though her husband had not then selected her to be his wife, but merely intended to marry and to defraud the woman he married,[77] and even though he uses money secured by the mortgage to make improvements on the land,[78] and even though the grantees make improvements, if made with knowledge of her rights.[79] A husband's conveyance is not fraudulent as to his wife unless it unreasonably lessens his power to support,[80] and the wife is not defrauded where the grantor retains sufficient property to protect the dower rights,[81] from which, in such case, her dower must be secured,[82] or where she receives at his death out of the proceeds of the sale of land an amount equal to the value of her dower right,[83] or where the conveyance complained of merely made a reasonable provision for the husband's children by a former marriage.[84] She cannot claim fraud where she marries with

75. Wallace v. Wallace, 137 Ia. 169, 114 N. W. 913.

76. Higgins v. Higgins, 219 Ill. 146, 76 N. E. 86; Williams v. Halford, 73 S. C. 119, 53 S. E. 88.

Under Civ. Code 1902, § 2368, authorizing an action by a wife and children to recover property conveyed by the husband to a concubine or bastard issue, such conveyance may be set aside during the lifetime of the husband, but in that event he takes nothing thereby. Williams v. Halford, 73 S. C. 119, 53 S. E. 88.

77. Daniher v. Daniher, 201 Ill. 489, 66 N. E. 239; Higgins v. Higgins, 219 Ill. 146, 76 N. E. 86; Goff v. Goff, 60 W. Va. 9, 53 S. E. 769.

78. Anderson v. Fitzpatrick, 20 Ky. Law Rep. 1617, 49 S. W. 786.

79. Dunbar v. Dunbar, 254 Ill. 281, 98 N. E. 563.

Where the grantee has made improvements, the widow is not dowable in such improvements, her right being limited to the land as it was prior to improvement. Overturf v. Martin, 170 Ind. 308, 84 N. E. 531. To the same effect see Warner v. Trustees of Norwegian Cemetery Ass'n, 139 Ia. 115, 117 N. W. 39.

80. Ullrich v. Ullrich, 68 Conn. 580, 37 A. 393.

81. Jones v. Jones, 213 Ill. 228, 72 N. E. 695; Lavery v. Hutchinson, 249 Ill. 86, 94 N. E. 6; Harrington v. Harrington, 142 N. C. 517, 55 S E. 409; Sprague v. Stevens, 32 R. I. 361, 79 A. 972.

82. Springsteen v. Springsteen, 158 N. Y. S. 848, 172 App. Div. 605.

83. Crow v. Brown, 22 Ky. Law Rep. 202, 56 S. W. 805.

84. Haynes v. Gwin, 137 Ark. 387, 209 S. W. 67; Goff v. Goff's Ex'rs, 175 Ky. 75, 193 S. W. 1009, 176 Ky. 243, 195 S. W. 438.

knowledge of the conveyances to defeat her dower right.[85] His sole conveyance of his lands cannot be a fraud where the purchaser knows that the wife's right is not barred thereby.[86] Therefore transfers by him made in good faith are not fraudulent as to her if he has previously provided for her to her satisfaction,[87] or if she is given a sufficient portion of the proceeds of the conveyance.[88]

Where her property stands in his name, his sale of it without her knowledge for less than its value, and with intent to deprive her of her rights, is fraudulent as to her.[89] So acts of the husband during his lifetime, committed for the purpose of defrauding the wife of her distributive share in his personal estate after his decease, have been set aside in equity. Thus in Maryland, in a case where it appeared that the husband with such design had turned his personal into real estate, and had then executed conveyances of the real estate to other parties, while retaining the title-deeds in his own hands and keeping in possession of the premises, the conveyances were set aside after his death as a fraud upon his wife's lawful rights.[90] On the other hand, in Illinois, a husband's transfer of his personal property to his son, in consideration of an annuity for his own life, has been sustained as against his widow, even though made with the design of defeating her distributive rights.[91]

The American courts are extending to the wife the same protection long accorded the husband by holding that a conveyance without consideration by the prospective husband before marriage, concealed from the fiancee, will not bar her dower rights.[92] Such a

85. Collins v. Smith, 144 Ia. 200, 122 N. W. 839; Smith v. Erwin, 26 Ky. Law Rep. 760, 82 S. W. 411.

86. Warner v. Trustees of Norwegian Cemetery Ass'n, 139 Ia. 115, 117 N. W. 39.

87. Trabbic v. Trabbic, 142 Mich. 387, 105 N. W. 876, 12 Det. Leg. N. 782.

88. Weber v. Salisbury, 149 Ky. 327, 148 S. W. 34.

89. Tate v. Tate, 19 Ohio Cir. Ct. R. 532, 10 O. C. D. 321; Starr v. Kaiser, 41 Ore. 170, 68 P. 521.

90. Hays v. Henry, 1 Md. Ch. 337.

91. Padfield v. Padfield, 78 Ill. 16.

92. Deke v. Huenkemeier, 260 Ill. 131, 102 N. E. 1059; McAulay v. McAulay (S. C.), 79 S. E. 785.

secret voluntary conveyance by a woman after engagement and before marriage has long been held void against the husband's curtesy, as it is regarded as a fraud on the fiance.[93] If the fiance discovers the fraud attempted, and then the marriage takes place, he or she is barred by acquiescence.[94] Such conveyances have, however, been upheld when made to one whom the donor was under some duty to support, as in case of an aged parent.[95]

The recent tendency of the courts is to extend protection to the wife of her dower rights in property conveyed by the husband on the eve of marriage to property conveyed by him to deprive any future wife of her dower even before he was engaged to the woman he later married. This can be supported on the analogy of conveyances void as in fraud of future creditors.[96]

So a conveyance by a man a few days before his marriage, when he was engaged to be married, to his daughters will be annulled as fraudulent as against the dower rights of his wife, especially where the deed was kept secret until after his death and he continued to live upon the property, paying the taxes which were assessed to him.[97]

A man cannot on the eve of his marriage convey his real estate by way of gift without the consent of his intended wife and thus deprive her of the rights of a wife in the real estate thus conveyed. The deed made under such circumstances is not, however, wholly void and will not be set aside except as to her inchoate right of dower. The claim that she would be in a better position in other respects if the land were still his cannot be used to invalidate the deed. The deed could be set aside only so far as to protect some

93. Dunbar v. Dunbar, 254 Ill. 281, 98 N. E. 563.

94. Higgins v. Higgins, 219 Ill. 146, 76 N. E. 86.

95. Hamilton v. Smith, 57 Ia. 15, 10 N. W. 276.

96. Jarvis v. Jarvis (Ill.), 122 N. E. 121; Deke v. Huenkemeier, 260 Ill. 131, 102 N. E. 1059; Deke v. Huenkemeier (Ill. 1919), 124 N. E. 381 (holding that property also subject to the widow's award).

97. Nicholson v. Rittenhouse, 66 Pitts. Leg. J. 679.

legal right and the only legal right of the wife is her inchoate right of dower.[98]

§ 1435. Release.

Usually where the husband means to sell his land, the wife joins him in a conveyance during his lifetime, in compliance with certain statute formalities, for the purpose of releasing dower; and if this be properly done (and in general a strict execution on her part is insisted upon by American statutes); her title becomes forever extinguished as against the purchaser and his heirs and assigns.[1] To bar the wife's rights the intention to

98. Deke v. Huenkemeier, 260 Ill. 131, 102 N. E. 1059, 48 L. R. A. (N. S.) 512; Dudley v. Dudley, 76 Wis. 567, 45 N. W. 602, 48 L. R. A. (N. S.) 512; Chandler v. Hollingsworth, 3 Del. Ch. 99.

1. Virgin v. Virgin, 91 Ill. App. 188 (aff. 189 Ill. 144, 59 N. E. 586).

The "inchoate right of dower" is not a personal claim against the husband, but is a right that may ripen into an estate in case he dies first, and hence a release by a common-law wife of all demands she may have against her husband by reason of past relations or for any cause whatever does not release her dower rights. Lavery v. Hutchinson, 249 Ill. 86, 94 N. E. 6; Virgin v. Virgin, 91 Ill. App. 188 (affd., 189 Ill. 144, 59 N. E. 586).

A joint deed of the widow and heir will bar dower. Campbell v. Wilson, 195 Ill. 284, 63 N. E. 103; Little v. Mundell (Ind.), 109 N. E. 227; Sharts v. Holloway, 150 Ind. 403, 50 N. E. 386; Druckamiller v. Coy, 42 Ind. App. 500, 85 N. E. 1028; Martin v. Farmers' Loan & Trust Co. (Ia.), 163 N. W. 361; Worthington v. Middleton, 6 Dana (Ky.), 300; Morgan v. Wickliffe, 115 Ky. 226, 72 S. W. 1122, 24 Ky. Law Rep. 2104; Segal v. Reisert, 128 Ky. 117, 107 S. W. 747, 32 Ky. Law Rep. 901; Brown v. Lapham, 3 Cush. (Mass.) 551; Cicotte v. Stebbins, 49 Mich. 631, 14 N. W. 666; Fifth Nat. Bank v. Pierce, 117 Mich. 376, 75 N. W. 1058, 5 Det. Leg. N. 251; Bray v. Conrad, 101 Mo. 331, 13 S. W. 957; First Nat. Bank v. Kirby, 269 Mo. 285, 190 S. W. 597; Needles v. Ford, 167 Mo. 495, 67 S. W. 240; Brown to Use of Clardy v. Brown, 47 Mo. 130, 4 Am. Rep. 320; Bush v. Piersol, 183 Mo. 500, 81 S. W. 1224; Glascock v. Glascock, 217 Mo. 362, 117 S. W. 67; Tyler v. Tyler, 50 Mont. 65, 144 P. 1090 (not an option); Perley v. Woodbury, 76 N. H. 23, 78 A. 1073; Butler v. Farry, 68 N. J. Eq. 760, 63 A. 240; Goodheart v. Goodheart, 63 N. J. Eq. 746, 53 A. 135; Krah v. Radcliffe, 78 N. J. Eq. 305, 81 A. 1133 (Ch. 1908); Same v. Wassmer, 75 N. J. Eq. 109, 71 A. 404; McMichael v. Russell, 74 N. Y. S. 212, 68 App. Div. 104; Schanz v. Sotscheck, 152 N. Y. S. 851; Stoehr

release dower must be plain,[2] and cannot rest merely in infer-

v. Moerlein Brewing Co., 27 Ohio Cir. Ct. 330; Robison v. Hicks, 76 Ore. 19, 146 P. 1099; Lavender v. Daniel, 58 S. C. 125, 36 S. E. 546; Miller v. Farmers' Bank, 49 S. C. 427, 27 S. E. 514, 61 Am. St. R. 821.

In Tennessee it is held that a widow may be reimbursed for her homestead and dower out of the personalty of her husband's insolvent estate, where the only realty of which the husband died seised was lost by foreclosure of a mortgage in which she released dower and homestead, even though she did not assert her right thereto till after the foreclosure. Yoe v. Sansom (Tenn.), 48 S. W. 317.

Under the Virginia statute providing that a wife's dower cannot be barred by an unrecorded deed, a decree establishing title under a lost deed does not bar dower. Building Light & Water Co. v. Fray, 96 Va. 559, 32 S. E. 58; Hoy v. Varner, 100 Va. 600, 42 S. E. 690; Hill v. Horse Creek Coal Land Co., 70 W. Va. 221, 73 S. E. 718; Headley v. Colonial Oil Co., 67 W. Va. 628, 69 S. E. 296.

Joining in a contract of sale, though executed as required by law, will not bar dower. Crookshanks v. Ransbarger, 80 W. Va. 21, 92 S. E. 78; Todd v. Interstate Mortgage & Bond Co. (Ala.), 71 So. 661 (where the widow joined her husband's heirs in a mortgage of his land); Fletcher v. Shepherd, 174 Ill. 262, 51 N. E. 212; Potter v. Skiles, 114 Ky. 132, 24 Ky. Law Rep. 910, 70 S. W. 301 (mod. rel. 114 Ky. 132, 24 Ky. Law Rep. 1457, 71 S. W. 627); Young v. Hyde, 255 Mo. 496, 164 S. W. 228; Bresee v. Ormsby, 91 Neb. 399, 136 N. W. 256; Graves v. Johnson, 172 N. C. 176, 90 S. E. 113. See Radley v. Radley, 70 N. J. Eq. 248, 62 A. 195; Lee v. Timken, 41 N. Y. S. 979, 10 App. Div. 213, 75 N. Y. St. R. 1356; Lewis v. Apperson, 103 Va. 624, 49 S. E. 978, 68 L. R. A. 867, 106 Am. St. R. 903; 1 Washb. 200, 201, and cases cited; Ulp v. Campbell, 19 Pa. 361; Curf v. Donaldson, 53 Ia. 291; Beavers v. Baucum, 33 Ark. 722; Knox v. Brady, 74 Ill. 476. See, *supra*, § 458 *et seq.*, as to wife's conveyance in general. As to effect of wife's release of dower on her husband's fraudulent conveyance, see 1 Washb. Real Prop. 202; White v. Graves, 107 Mass. 325. *Semble* that joining in the husband's conveyance, fraudulent against his creditors, does not affect her dower right. The effect of a wife's uniting in a conveyance with her husband is not to vest any estate in the grantee separate and distinct from that of her husband, but rather to relinquish an inchoate right in the nature of an encumbrance. Corr v. Porter, 33 Gratt. (Va.) 278; Wyman v. Fox, 59 Me. 100; Lockett v. James, 8 Bush (Ky.), 28.

In Arkansas the widow of a deceased mortgagor is not barred of dower in mortgaged lands by a foreclosure decree, though a party to the suit, unless her right to dower was put in issue. Fourche River Lumber Co. v. Walker, 96 Ark. 540, 132 S. W. 451.

2. Westfall v. Lee, 7 Ia. 12.

Merely signing and acknowledging a mortgage is not a sufficient release

ence.[3] Such a release must be in writing, and executed as required by law,[4] and, in some cases, acknowledged.[5] Such a release may be made by the wife's attorney-in-fact;[6] it will not bar dower as against one not claiming under the release,[7] and if conditional, will be voidable on failure to perform the condition.[8] If a conveyance in which the wife has released dower is set aside, her release is also avoided.[9] A release will not bar dower where she is a minor when

of dower, where the wife is not named in the body of the instrument. Beverly v. Waller, 115 Ky. 596, 24 Ky. Law Rep. 2505, 74 S. W. 264, 103 Am. St. R. 342; Bear v. Stahl, 61 Mich. 203, 28 N. W. 69.

3. *In re* McVay's Estate, 260 Pa. 83, 103 A. 505; McLeod v. McLeod, 169 Ala. 654, 53 So. 834.

4. Carling v. Peebles, 215 Ill. 96, 74 N. E. 87; Davis v. Bartholomew, 3 Ind. 485; Worthington v. Middleton, 36 Ky. 300; Giles v. Moore, 4 Gray (Mass.), 600; Bealey v. Blake, 153 Mo. 657, 55 S. W. 288; Lewis v. Apperson, 103 Va. 624, 49 S. E. 978, 68 L. R. A. 867, 106 Am. St. R. 903. To the same effect see Dooley v. Greening, 201 Mo. 343, 100 S. W. 43 (where the wife gave a quitclaim deed releasing her interest in the husband's lands which had been sold by his curator).

A *quitclaim deed* given after the husband has conveyed the land by his sole deed has been held sufficient as a release of dower. Fowler v. Chadima, 134 Ia. 210, 111 N. W. 808.

5. Maynard v. Davis, 127 Mich. 571, 86 N. W. 1051, 8 Det. Leg. N. 460; Genoway v. Maize, 163 Mo. 224, 63 S. W. 698; Saldutti v. Flynn, 72 N. J. Eq. 157, 65 A. 246; Goodheart v. Goodheart, 63 N. J. Eq. 746, 53 A. 135; Moore v. Thomas, 1 Ore. 201; Wethered v. Conrad, 73 W. Va. 551, 80 S. E. 953; Jarrell v. French, 43 W. Va. 456, 27 S. E. 263; Fee v. Sharkey, 59 N. J. Eq. 284, 44 A. 673 (aff. 60 N. J. Eq. 446, 45 A. 1091).

6. Platt v. Finck, 70 N. Y. S. 74, 60 App. Div. 312.

The Iowa statute providing that no conveyance theretofore made by which the husband or wife conveyed the inchoate right of dower of the other spouse, under a power of attorney executed by "each" spouse, shall not be invalid, does not apply where the wife alone executed a power of attorney authorizing such conveyance by her husband. Swartz v. Andrews, 137 Ia. 261, 114 N. W. 188.

7. McCord v. Wright, 97 Ind. 34; Pixley v. Bennett, 11 Mass. 298; Robinson v. Bates, 3 Mete. (Mass.) 40; Case v. Hewitt, 21 Ohio Cir. Ct. 730, 11 O. C. D. 823; Shupe v. Rainey, 255 Pa. 432, 100 A. 138; Nickell v. Tomlinson, 27 W. Va. 697; Such as, for example, the husband's general creditors or heirs. Commercial Banking & Trust Co. v. Dudley (W. Va.), 86 S. E. 307; Smith v. Noble, 174 Ky. 15, 191 S. W. 641.

8. Brown v. Tilley, 25 R. I. 579, 57 A. 380; Carver v. Ward (W. Va.), 95 S. E. 828.

9. Marsh v. Walters, 220 F. 805, 136 C. C. A. 409; *In re* Lingafelter, 181 F. 24.

It has been held otherwise in

she releases dower,[10] or where the release is procured by fraud,[11] or where the husband's deed in which she joins is void as to him,[12] or where she is disabled by coverture from contracting,[13] or where the release is without consideration.[14]

§ 1436. Release Contained in Conveyance Fraudulent as Against Creditors.

Such a release will not bar dower where the husband's deed is fraudulent as to creditors,[15] unless she is a party to the fraud.[16] So where a conveyance by a husband in which the wife joins releasing her dower is vacated and set aside as null and void as a fraudulent preference in bankruptcy proceedings and the property

Arkansas where a widow joined with infant heirs in conveying the land, and where the infants afterwards disaffirmed, the deed being effective to pass her interest. Beauchamp v. Bertig, 90 Ark. 351, 119 S. W. 75; Jenkins v. Mollenhauer, 173 N. Y. S. 870.

A release of dower on an instrument is merely an incident to the conveyance, which, if the conveyance never takes effect or is extinguished by act of the parties or by operation of law, reverts *eo instanti* to the wife. Gainey v. Anderson, 87 S. C. 47, 68 S. E. 888; Reynolds v. Whitescarver, 66 W. Va. 388, 66 S. E. 518.

10. Shawhan v. Smith, 4 Ky. Law Rep. 440.

11. Silverthorn v. Troxall (N. J.), 12 A. 614; Troxell v. Silverthorn, 45 N. J. Eq. 330, 19 A. 622; Klein v. Gregg, 32 Ohio Cir. Ct. 721.

To enable a wife to set aside a release of dower procured by fraud and coercian, she must aver and prove that the releasee had knowledge of the facts. Campbell v. Harris Lithia Springs Co., 74 S. C. 282, 54 S. E. 378; *In re* Bell's Estate, 29 Utah, 1, 80 P. 615.

12. Dupe v. Hadley, 113 Ind. 416, 16 N. E. 391.

13. Smith v. Oglesby, 33 S. C. 194, 11 S. E. 687.

14. French v. Poole, 83 Kan. 281, 111 P. 488; Dallavo v. Dallavo, 189 Mich. 350, 155 N. W. 538 (where a second wife released dower in a conveyance of lands to a former wife to settle her claims).

A promise to pay a consideration for a release of dower may be enforced against the releasee. Grayson v. Grayson (Mo.), 190 S. W. 930.

15. Frederick v. Emig, 186 Ill. 319, 57 N. E. 883, 78 Am. St. R. 283; Lockett's Adm'r v. James, 8 Bush (Ky.), 28; Matthews v. Thompson, 186 Mass. 14, 71 N. E. 93, 66 L. R. A. 421, 104 Am. St. R. 550; Devorse v. Snider, 60 Mo. 235; Bradshaw v. Halpin, 180 Mo. 666, 79 S. W. 685; Bealey v. Blake, 153 Mo. 657, 55 S. W. 288; Fleming v. Pople, 78 W. Va. 176, 88 S. E. 1058.

16. Wells v. Estes, 154 Mo. 291, 55

is directed to be divided equally among the creditors this operated to restore to the wife her right of dower in the property. The general principle is that a wife's release of dower can survive only so long as it attends the estate and conveyance of her husband and when the principal estate falls, the incident must fall with it.[17]

§ 1437. Transfer of Personal Property.

The Kansas statute forbidding spouses from creating any liens on the personal property of either without the consent of both does not prevent one spouse from turning over his personalty to satisfy a debt, such transaction being a sale,[18] but a husband's deed in which she does not join will pass what he owns.[19] Whether a personal property mortgage is of household goods, so as to require the assent of the wife, is a question of fact.[20] A deed duly executed in accordance with the statute will not pass the wife's personal property which was not capable of being reduced to possession by the husband.[21]

§ 1438. Adverse Possession, Dedication, Escheat Limitations, Partition.

Dower may be barred by adverse possession against the husband,[22] or against the wife.[23] Where dower attaches only to land of which the husband dies seised, he may bar her dower by a dedi-

S. W. 255; Dey v. Allen, 77 N. J. Eq. 522, 78 A. 674; Campbell v. Weber, 79 N. J. Eq. 519, 81 A. 732.

17. *Re* Lingafelter, 104 C. C. A. 38, 181 F. 24, 32 L. R. A. (N. S.) 103, and learned note.

18. Beach v. Fireovid, 84 Kan. 357, 114 P. 206.

19. Heckmann v. Detlaff, 283 Ill. 505, 119 N. E. 639.

20. Chiles v. Kahle, 65 Ill. App. 361.

21. Nelson v. Jennings, 2 Pat. & H. (Va.) 369.

22. Haller v. Hawkins, 245 Ill. 492, 92 N. E. 299; Butcher v. Butcher, 137 Mich. 390, 100 N. W. 604, 11 Det. Leg. N. 297; Putney v. Vinton, 145 Mich. 219, 108 N. W. 655, 13 Det. Leg. N. 459; Brown v. Morrisey, 124 N. C. 292, 32 S. E. 687; United States Trust Co. of New York v. Pleasant Ave. Realty Co., 153 N. Y. S. 65, 167 App. Div. 762; but see *contra*, Lucas v. Whitacre, 121 Ia. 251, 96 N. W. 776.

23. Belfast Inv. Co. v. Curry, 264 Mo. 483, 175 S. W. 201.

cation to public use.[24] Where such is the law a partition sale will divest dower,[25] but the court may direct compensation to be paid to the wife.[26] Where dower attaches to all the land of which the husband is seised during coverture, the wife will take dower in the portion set off to the husband in the partition.[27] In Ohio the court may set off property to allottees subject to dower and require other allottees to indemnify the allottee whose allotment is subject to dower.[28] Dower is not barred by the escheat of the husband's land,[29] but may be barred by statutes of limitation.[30]

§ 1439. Estoppel.

Dower may be barred by the wife's own acts sometimes, in the nature of an estoppel, though very rarely;[31] the late cases showing

24. Duncan v. City of Terre Haute, 85 Ind. 104; Benton v. City of St. Louis, 217 Mo. 687, 118 S. W. 418.

25. Haggerty v. Wagner, 148 Ind. 625, 48 N. E. 366, 39 L. R. A. 384; Wagner v. Carskadon, 28 Ind. App. 573, 60 N. E. 731 (rehearing denied, 28 Ind. App. 573, 61 N. E. 976); Sire v. City of St. Louis, 22 Mo. 206.

26. Reed v. Reed, 25 Ky. Law Rep. 2324, 80 S. W. 520.

27. Potter v. Wheeler, 13 Mass. 504. See Jones v. Brewer, 1 Pick. (Mass.) 315.

28. Walker v. Hall, 15 Ohio St. 355, 86 Am. Dec. 482.

29. Smith v. Doe, 111 N. Y. S. 525.

30. Joplin Brewing Co. v. Payne, 197 Mo. 422, 94 S. W. 896.

31. *In re* Acretelli, 173 F. 121; Higgins Oil & Fuel Co. v. Snow, 113 F. 433, 51 C. C. A. 267; Thompson v. Wilhite, 131 Ark. 77, 198 S. W. 271.

A wife has been held not estopped to claim dower by filing a bill asserting an equitable title in the land. Lobmeyer v. Durbin, 213 Ill. 498, 72 N. E. 1118; Brown v. Brookhart, 146 Ia. 79, 124 N. W. 882; Oldham v. McElroy, 134 Ky. 454, 121 S. W. 414; Hanna's Assignees v. Gay, 117 Ky. 695, 25 Ky. Law Rep. 1794, 78 S. W. 915.

As where, after her husband had exchanged a house and lot for a farm, she joins with him in a mortgage of the latter, thereby evidencing an intention not to claim dower in it. Stevenson v. Brasher, 90 Ky. 23, 11 Ky. Law Rep. 799, 13 S. W. 242; Holland v. Netterberg, 107 Minn. 380, 120 N. W. 527; Kantor v. Cohn, 168 N. Y. S. 846, 181 App. Div. 400.

Where a wife, in good faith believing herself divorced, remarried and lived with her so-called second husband for many years, she was held estopped to claim dower in the land of the first husband acquired after their separation. Kantor v. Cohn, 164 N. Y. S. 383, 98 Misc.

that the courts take that view of the facts which is most favorable to the widow.[32] They will permit this defence to defeat dower only where to permit her to claim dower will enable her to work a fraud.[33] To raise such an estoppel all the elements of an estoppel *in pais* must exist,[34] including a false representation of material facts to one who is ignorant of the truth,[35] and while she may be estopped by mere silence,[36] the defence will not bar dower unless she is under a duty to speak.[37]

The right of dower may be lost as against an innocent purchaser, even though the dower right was still inchoate, by equitable estoppel,[38] as other rights are lost probably even by mere silence.[39] So where parties obtained an invalid divorce which both thought valid and both parties married again with the knowledge of each other the woman on the death of the man is estopped to set up

355; King v. King, 247 Pa. 89, 93 A. 20; Smith v. Oglesby, 33 S. C. 194, 11 S. E. 687; Headley v. Colonial Oil Co., 67 W. Va. 628, 69 S. E. 296; 1 Washb. 197; Crenshaw v. Creek, 52 Mo. 98.

32. Ferry v. Troy Laundry Co., 238 F. 867; Starr v. Newman, 107 Ga. 395, 33 S. E. 427; Hyatt v. O'Connell, 130 Ia. 567, 107 N. W. 599; Cunningham v. Cunningham, 125 Ia. 681, 101 N. W. 470; Dunn v. Portsmouth Sav. Bank, 103 Ia. 538, 72 N. W. 687; Stevenson v. Brasher, 90 Ky. 23, 11 Ky. Law Rep. 799, 13 S. W. 242; Hall v. Marshall, 139 Mich. 123, 102 N. W. 658, 11 Det. Leg. N. 813, 111 Am. St. R. 404; Madson v. Madson, 69 Minn. 37, 71 N. W. 824; Cazier v. Hinchey, 143 Mo. 203, 44 S. W. 1052; Motley v. Motley, 53 Neb. 375, 73 N. W. 738, 68 Am. St. R. 608; Fern v. Osterhout, 42 N. Y. S. 450, 11 App. Div. 319; Hunt v. Reilly, 24 R. I. 68, 52 A. 681, 59 L. R. A. 206, 96 Am. St. R. 707; Hyatt v. O'Connell, 130 Ia. 567, 107 N. W. 599. To the same effect see Shipley v. Mercantile Trust & Deposit Co., 102 Md. 649, 62 A. 814. See Curtis v. Zutavern, 67 Neb. 183, 93 N. W. 400 (affd., reh., 73 Neb. 45, 103 N. W. 432).

33. Syck v. Hellier, 140 Ky. 388, 131 S. W. 30.

34 Sawyer v. Briggart, 114 Ia. 489, 87 N. W. 426; Wilson v. Willis, 131 Md. 47, 101 A. 694.

35. Morgan v. Sparks, 32 Ky. Law Rep. 1196, 108 S. W. 233; Foley v. Boulware, 86 Mo. App. 674.

36. Norton v. Tufts, 19 Utah, 470, 57 P. 409.

37. H. W. Wright Lumber Co. v. McCord, 145 Wis. 93, 128 N. W. 873.

38. Gilbert v. Reynolds, 51 Ill. 513; Norton v. Tufts, 19 Utah, 470, 57 P. 409.

39. Wood v. Seely, 32 N. Y. 105.

dower claims as against the husband's grantee who purchased in good faith.[40]

§ 1440. Murder of Husband.

The fact that a woman murdered her husband does not deprive her of dower rights given her by a statute which provides clearly how they may be lost and does not include murder as one of the reasons for forfeiture. Cases involving the right of one murdering the insured to collect on his insurance policy are not in point as they involve a contract right and the case also differs from that of a devisee who murders the testator. The common-law rule that no one shall take advantage of his own wrong cannot be used to alter or amend the clear terms of a statute.[41]

But a statute is valid which denies to one who kills another all right in his property as this act is construed to act upon the interest of the wife before the death of the husband, which interest is not vested and may therefore be changed by the legislature. This act renders the killing itself a disqualification with conviction a condition precedent to the assertion by others of rights adverse to the dower interest.[42]

40. Kantor v. Cohn, 56 N. Y. L. J. 1339. See discussion of this case in 30 Harvard Law Review, 647.

41. Metcalf v. State, — Okla. —, 156 P. 305, L. R. A. 1916E, 595. *The opposite result* has, however, been reached in analogous cases. Perry v. Strawbridge, 209 Mo. 621, 108 S. W. 641; Box v. Lanier, 112 Tenn. 393, 79 S. W. 1042. See 33 H. L. R. 475.

It has been held that a wife does not forfeit her dower by killing her husband. Eversole v. Eversole, 169 Ky. 793, 185 S. W. 487. See Davis v. Calvert, 18 Ky. Law Rep. 975, 38 S. W. 884; Phillips v. Wiseman, 131 N. C. 402, 42 S. E. 861; Statute Westminster 2; 1 Washb. Real Prop. 196, 258, n.; 4 Kent Com. 53; 1 Cruise Dig. 175; 2 Bl. Com. 130; Coggshall v. Tibbetts, 3 N. H. 41; Woodward v. Dowse, 10 C. B. (N. S.) 722; McAlister v. Novenger, 54 Mo. 251; 4 Am. Law Rev. 401. But see, *contra*, Sergent v. North Cumberland Mfg. Co., 112 Ky. 888, 23 Ky. Law Rep. 2226, 66 S. W. 1036.

42. Hamblin v. Marchant, — Kan. —, 180 P. 811.

CHAPTER X.

PROVISIONS IN LIEU OF DOWER.

SECTION 1441. Contracts Excluding Dower.
1442. Widow's Election Between Contract and Dower.
1443. Widow's Election Between Provisions of Husband's Will and Dower.
1444. Election When Widow Is Insane.
1445. Effect of Election on Remainders.

§ 1441. Contracts Excluding Dower.

We have seen, however, that antenuptial contracts executed without great formality, but in good faith, are permitted to exclude dower; provisions thus made being respected in equity.[43]

It is held in New Hampshire that a wife, owning a right of dower in her husband's lands, may properly convey it and take a promissory note of equal value payable to herself; or, owning a promissory note in her own right, secured by mortgage on the husband's estate, may sell and release her interest in such estate, and take a new note payable to herself.[44] And under modern equity and the married women's acts, the disposition must often be strong to protect the proceeds of a married woman's contingent or inchoate dower in her husband's lands as her separate estate, where her release was upon an intended consideration, and not as a mere favor.[45] Charging or encumbering her interest thus for her husband's benefit, she does not become a surety for him, or liable upon his mortgage note.[46] A wife, fraudulently induced by the grantee to join in conveying her husband's lands, to the loss of her inchoate rights of dower, has a right, under some recent married

43. Ater v. Dobson, 142 Ill. App. 646; Mintier v. Mintier, 28 Ohio St. 347; *supra*, §§ 501, 1425; Hathaway v. Hathaway, 46 Vt. 234.

44. Nims v. Bigelow, 45 N. H. 343.

45. Beals v. Storm, 26 N. J. Eq. 372; Gwathmey v. Pearce, 74 N. C. 398; Singree v. Welch, 32 Ohio St. 320.

46. Heburn v. Warner, 112 Mass. 271. But see *contra*, Fitcher v. Griffiths, 216 Mass. 174, 103 N. E. 471.

women's acts, to sue, during marriage, for the injury done her.[47] If, however, a wife fails to exact special consideration for executing her release with her husband, consideration to him alone will suffice.[48] Where a consideration is exacted, it is her separate estate.[49]

§ 1442. Widow's Election Between Contract and Dower.

A widow is usually required to elect between the contract and dower.[50] A wife's election to take under such a contract will bar her dower in any event.[51] Such an election cannot be made orally.[52]

§ 1443. Widow's Election Between Provisions of Husband's Will and Dower.

It is the accepted rule in this country that the widow must elect between her dower rights and provisions made for her under her husband's will.[53] Thus, statutes frequently provide that she may elect between other provision made for her in her husband's will

47. Simar v. Canaday, 53 N. Y. 298.

48. First Nat. Bank of Crown Point, Ind., v. Davis, 146 Ill. App. 462. See Bailey v. Litten, 52 Ala. 282. As to wife's election of provision under her husband's will in lieu of dower, see *supra*, § 442.

49. Williams v. Merriam, 72 Kan. 312, 83 P. 976; Riley v. Remington, 221 Pa. 121, 70 A. 552.

50. The Illinois statute relating to elections between jointure and dower has been held not to apply to mutual releases of the spouses of the interest of each in the other's estate. Edwards v. Edwards, 267 Ill. 111, 107 N. E. 847; Barnes v. Klug, 113 N. Y. S. 325, 129 App. Div. 192; Jenkins v. Mollenhauer, 173 N. Y. S. 870; Bibelhausen v. Bibelhausen, 159 Wis. 365, 150 N. W. 516.

51. Hieser v. Sutter, 195 Ill. 378, 63 N. E. 269; Grider v. Eubanks, 12 Bush (Ky.), 510; Dakin v. Dakin, 97 Mich. 284, 56 N. W. 562.

Where a widow until assignment of dower remained in a dower house given her by an ante-nuptial contract, it was held that she did not elect thereby to renounce dower, it appearing that the contract was not supported by a sufficient consideration. Moran v. Stewart, 173 Mo. 207, 73 S. W. 177. See Case v. Collins, 37 Ind. App. 491, 76 N. E. 781.

52. Mannan v. Mannan, 154 Ind. 9, 55 N. E. 855.

53. Jennings v. Jennings, 21 Ohio

and her right to dower, within reasonable time after her husband's death; this doctrine assuming that under all the special circumstances the two rights are to be construed as incompatible, and that thus the testator intended.[54] But the husband cannot by his will put the widow to her election as to property vesting in her by survivorship.[55]

A widow claiming her widow's rights in her husband's personalty because not mentioned in his will cannot also claim that the will caused an equitable conversion of his real estate as she cannot claim a benefit by reason of being omitted from the will and an additional benefit which can only arise by its provisions.[56]

The wife's privilege is carried even farther in Massachusetts and various other States by a statute which permits the widow to waive a provision made for her by her husband's will, and thereupon to take such portion as the law would have given her had he

St. 56; Richart v. Richart, 30 Ia. 465; Kent v. Dunham, 106 Mass. 586; Kreiser's Appeal, 69 Pa. 194.

54. Thompson v. Burra, L. R. 16 Eq. 592; Rogers v. Jones, L. R. 3 Ch. D. 688; Alling v. Chatfield, 42 Conn, 276. See Smither v. Smither, 9 Bush, 231; Hoover v. Landis, 76 Pa. St. 354; Haynie v. Dickens, 68 Ill. 267; Watrous v. Winn, 37 Ia. 72; Apperson v. Bolton, 29 Ark. 418. As to electing to take a child's part, see Sewell v. Smith, 54 Ga. 567. Election *in pais* is not favored, but formal election. Bierer's Appeal, 92 Pa. St. 265. And see 2 Jarm. Wills, 22, 35.

The will of a husband does not affect the widow's distributive "dower" interest under statute, though it may dispose of personalty against her. Estate of Davis, 36 Ia. 24.

55. Sanford v. Sanford, 58 N. Y. 69, applies this rule to a note taken by the husband in the names of himself and wife. But claims of survivorship in joint investments by husband and wife are not to be favored. Wait v. Bovee, 35 Mich. 425. Dower and distributive rights are sometimes mutually barred by antenuptial contract. *Supra*, §§ 501, 1425.

A bequest may be accepted under the husband's will in express lieu of dower. Collins v. Woods, 63 Ill. 285. But gifts or bequests of personalty are not readily presumed to stand in lieu of dower; it is rather a devise of real estate which should be thus interpreted, though the usual rules of construction are applicable. See Mitchell v. Word, 60 Ga. 525; Booth v. Stebbins, 47 Miss. 161.

56. Pacholder v. Rosenheim, 129 Md. 455, 99 A. 672, L. R. A. 1917D, 464.

died intestate.[57] But this privilege is accorded with some restrictions as to the full amount to be allowed her.[58]

The right on her part becomes complete upon her formal renunciation of the provisions under the will, without any surrender of property under the will.[59] But her election must be strictly made within the time designated by statute.[60] And it is to be inferred that the right of election is personal to herself, and cannot be exercised by her representatives or kindred after her death.[61]

Where the wife elects to take under her husband's will she is thereby barred as heir from taking a share in the husband's property which is not disposed of by will. The court sees no reason for interpolating this exception into the general rule of election.[62]

The election of the widow in the State of the domicile to take under the will of her husband binds her in another State in which he held real estate as to which he died intestate. The doctrine of estoppel by election is not a creature of statute but is an equitable doctrine founded upon equitable principles. Therefore she cannot

57. Firth v. Denny, 2 Allen, 468; Towle v. Swasey, 106 Mass. 100. Similar statutes are in force in other States. White v. Dance, 53 Ill. 413; Stockton v. Wooley, 20 Ohio St. 184; Arrington v. Dortch, 77 N. C. 367; Cummings v. Cummings, 51 Mo. 261; cases *infra*. See Miller v. Stepper, 32 Mich. 194.

58. Crozier's Appeal, 90 Pa. St. 384; Register v. Hensley, 70 Mo. 189; *In re* Wilber, 52 Wis. 295.

59. Register v. Hensley, 70 Mo. 189.

60. Waterbury v. Netherland, 6 Heisk. 512. Here she had relied on the legal advice of the executor. See Von Arb v. Thomas, 163 Mo. 33, 63 S. W. 94.

61. So held in Crozier's Appeal, 90 Pa. St. 384.

62. Compton v. Akers, 96 Kan. 229, 150 Pac. 219, L. R. A. 1917D 758, citing Walker v. Upson, 74 Conn. 128, 49 A. 904; Smith v. Perkins, 148 Ky. 387, 146 S. W. 758; Ellis v. Dumond, 259 Ill. 483, 102 N. E. 801; Jackson's Appeal, 126 Pa. 105, 17 A. 535.

There is a very respectable list of authorities to the contrary on this question. See Tavernor v. Grindley, 32 L. T. N. S. (Eng.) 495; Pinckney v. Pinckney, 1 Bradf. (N. Y.) 269; Hall v. Hall, 2 M'Cord Eq. (S. C.) 269; Thompson's Estate, 229 Pa. 549, 79 A. 173; State v. Holmes, 115 Mich. 456, 73 N. W. 548; Nickerson v. Bowly, 8 Met. (Mass.) 424.

in this case take any interest in real estate as to which he died intestate.[63]

§ 1444. Election When Widow Is Insane.

The widow's right of election to take dower rather than under her husband's will is personal to her and ceases at her death. If she becomes insane, however, the better authority is that although her guardian cannot make an election for her still the election may be made by the guardian with the sanction of the court. There is not one law for a sane and another for an insane widow.[64]

An insane widow may have her election as to the will of her husband by a suit in equity by next friend.[65] The court has in equity jurisdiction of her interests. In deciding the question the court should be guided by the best interests of the widow which does not necessarily mean from a pure monetary viewpoint. Her kinsmen have no right to be considered in the matter. The right of the testator to dispose of her property as he pleases may also be taken into consideration. So where the widow is incurably insane and the will makes ample provision for her care while insane and further provision for her if she recovers the court will elect for her in favor of the will,[66] although in some States it is held that the right of election is personal to the widow and cannot be exercised by the guardian of an insane widow and if she is insane the right is defeated.[67]

63. *Re* McAllister (Minn.), 160 N. W. 1016, L. R. A. 1917C, 504.

64. German Evangelical, etc., Home v. Seago, 155 Ill. App. 76; Andrews v. Bassett, 92 Mich. 449, 52 N. W. 743, 17 L. R. A. 296; Hardy v. Richards (Miss.), 54 So. 76, 35 L. R. A. (N. S.) 1210; State v. Hunt, 88 Minn. 404, 93 N. W. 314.

65. Penhallow v. Kimball, 61 N. H. 596; Van Steenwyck v. Washburn, 59 Wis. 483, 17 N. W. 289, 48 Am. R. 632; Kennedy v. Johnston, 65 Pa. 454, 3 Am. R. 650; Harding v. Harding, 140 Ky. 277, 130 S. W. 1098, Ann. Cas. 1912B, 526; *Re* Connor (Mo.), 162 S. W. 252, 49 L. R. A. (N. S.) 1108.

66. *Re* Connor (Mo.), 162 S. W. 252, 49 L. R. A. (N. S.) 1108. See also Penhallow v. Kimball, 61 N. H. 596; Kennedy v. Johnston, 65 Pa. 451, 3 Am. R. 650; Percy v. Hunt, 88 Minn. 404, 93 N. W. 314.

67. Crenshaw v. Carpenter, 69 Ala. 572, 44 Am. R. 539; Clark v. Boston

§ 1445. Effect of Election on Remainders.

Remainders given after a life estate to the widow are accelerated by her election to take against the will [68] unless the will evinces a clear determination that this shall not take place as where the distribution in remainder is fixed at a definite time independently of the widow's death or it expressly provides for the effect her election should have.[69]

Safe Deposit & Trust Co. (Me.), 102 A. 289, L. R. A. 1918B, 384; Camardella v. Schwartz, 126 N. Y. App. Div. 334, 110 N. Y. Supp. 611.

68. *Re* Disston, 257 Pa. 537, 101 A. 804, L. R. A. 1918B, 62.

69. Reighard's Estate, 253 Pa. 43, 97 A. 1044.

CHAPTER XI.

RIGHTS OF WIDOW BESIDES DOWER.

SECTION 1446. Widow's Allowance.
1447. Inheritance Tax on Widow's Allowance.
1448. The Widow's Paraphernalia.
1449. Incidents of Paraphernalia.
1450. Wife's Equity of Exoneration.
1451. Widow's Right and Duty to Bury Husband.
1452. Quarantine.

§ 1446. Widow's Allowance.

Another liberal provision made by the legislatures of some American States is that known as the widow's allowance. This is a reasonable sum, such as the Court of Probate may order, as necessaries to the widow for herself and the family, or, if there be no widow, to the minor children. The allowance is set apart as something superior to the claims of general creditors, and is even preferred to the expenses of administration, funeral and last illness of the husband. The amount is at the discretion of the court; and where the husband has died insolvent, leaving few assets, it is not uncommon for the whole of the personal property to be thus awarded to the widow, whereby is afforded an expeditious means of settling perplexing little estates. This right is treated in Massachusetts as personal to the widow, provided she survive her husband; it does not pass to her representatives.[70] Nor is it considered in the same light as a distributive share; but the amount, if allowed, is generally to be regulated according to the necessitous circumstances of the widow and her family.[71]

70. Otherwise in Indiana. Bratney v. Curry, 33 Ind. 399.

71. Mass. Gen. Laws, ch. 196, § 2. See Hollenbeck v. Pixley, 3 Gray, 521; Brazer v. Dean, 15 Mass. 183; Adams v. Adams, 10 Metc. 170; Smith's Prob. Pract. (Mass.) 106–109; Sherman v. Sherman, 21 Ohio St. 631. In Illinois, even a rich widow may claim the allowance. Strawn v. Strawn, 53 Ill. 263. See Brooks v. Martin, 43 Ala. 360, as to

§ 1447. Inheritance Tax on Widow's Allowance.

The allowance made out of the estate under a statute for the maintenance and support of the widow during administration is not subject to the inheritance tax as it is not treated as part of the estate but as something to be taken out before distribution. The same result is reached in case of the personal property which the widow is allowed to take from the estate before distribution.[72]

§ 1448. The Widow's Paraphernalia.

The widow's *paraphernalia* is a species of property recognized at the common law, though borrowed from the civilians. It consists of such articles of wearing apparel, personal ornament, and personal convenience as are suitable to a wife's rank and degree, and such as she continued to use during the marriage.[73] The term *paraphernalia* is derived from the Greeks, and transmitted to England through the civil law. But while the wife's *paraphernalia* at the civil law resembled what we call the wife's separate property, the word itself has a more limited signification in England and America, being confined to personal necessaries or ornaments, and having no possible application to real estate. Blackstone says the word signified "something over and above her dower;" whereas, as a late English writer observes, it really meant something of her own, not surrendered by her at her marriage; something reserved and kept back from the *dos,* or fortune, which she brought her husband.[74]

The common-law doctrine of *paraphernalia* is this: that the suitable ornaments and wearing apparel of a married woman, which she had at the time of her marriage, or which come to her

allowance of a "work horse." As to exemption of this allowance from liability, see Davis v. Davis, 63 Ala. 293. And see King's Appeal, 84 Pa. St. 345.

72. State v. Probate Court (Minn.), 163 N. W. 285, L. R. A. 1918F, 436.

73. 2 Bl. Com. 436; Macq. Hus. & Wife, 147.

74. Macq. Hus. & Wife, 152. Our writers sometimes make confusion by citing maxims of Roman law in definition of English doctrines. See 2 Roper Hus. & Wife, 140; 1 Bright Hus. & Wife, 286, *n.* See *supra,*

through her husband before or during coverture, remain his personal property during his life, and he may sell and dispose of them during his life; but such as remain at the time of his death belong thenceforth to her absolutely as her *paraphernalia*.[75] It seems that he may even give them away while coverture lasts, in the exercise of his marital rights. For the loss thereof the wife cannot sue alone, but the husband sues as for his own property.[76] But he certainly cannot bequeath them to his wife; nor on principle dispose of them as *donatio causa mortis*.[77]

Paraphernalia are therefore to be distinguished from the wife's separate property, which we have considered, inasmuch as her rights are perfected, only when she becomes a widow; while the property is alienable not by herself, but by her husband, during his life.[78] Such gifts from the husband are further to be distinguished from gifts bestowed solely upon the wife by her father, or by a relative, or even by a stranger. For in the latter instance they would be deemed gifts to her separate use; and then, if received with the husband's consent, neither he nor his creditors could afterwards dispose of them.[79]

Mere ornaments for a parlor are not to be treated as paraphernal property.[80] Nor can articles be claimed as such which are, in fact, heirlooms.[81] But a gold watch worn by the wife of one who main-

§§ 342, 343. In *Re* Harrall, 31 N. J. Eq. 101, the word "paraphernalia" appears to be used as synonymous with "separate estate," ornaments, etc.

75. Tipping v. Tipping, 1 P. Wms. 730; 1 Rolle, 911, L. 35; Com. Dig. Baron & Feme, Paraphernalia; Macq. Hus. & Wife, 147, 148; State v. Hays, 21 Ind. 288. See Rawson v. Pennsylvania R. R. Co., 48 N. Y. 212.

76. Hawkins v. Providence R., 119 Mass. 596; McCormick v. Penn. Contral R., 49 N. Y. 303.

77. 2 Bl. Com. 436; Noye's Max., ch. 49.

78. Cro. Car. 344; Com. Dig. Baron & Feme, Paraphernalia. The paraphernalia differ also from the wife's pin-money. *Supra*, § 243. Married women's acts may, of course, render the wife's clothing, jewelry, etc., absolutely her own. See *supra*, § 286 *et seq.*

79. 2 Story Eq. Juris. 555.

80. Graham v. Londonderry, 3 Atk 393.

81. Calmady v. Calmady, 11 Vin. Abr. 181, 182.

tains a fair social position may be treated as paraphernal.[82] A "necessary bed" is paraphernal.[83] Jewels purchased by the husband and worn by the wife with her other ornaments, it is said, become her *paraphernalia,* in absence of evidence to the contrary; while family jewels, by merely being worn by the wife, do not.[84] Where a piece of jewelry, in possession of the husband at the time of marriage as an heirloom, is greatly enhanced in value by adding new diamonds, and is then given to the wife to wear, though bequeathed to his heirs, the rule, as laid down by Lord Chancellor Macclesfield, is to separate the new diamonds after the husband's death, and bestow them upon the widow as her *paraphernalia,* leaving the heirs to enjoy the residue.[85] And the old books say that if the husband delivers cloth to his wife for her apparel, and dies before it is made up, she shall have the cloth.[86] The question of value is not material in setting off the widow's *paraphernalia,* so long as the articles are suitable to her degree.[87] And while the modern cases which turn on such questions are rare, especially in this country, it cannot be doubted that a liberal rule would at this day be applied in the widow's favor.

As to personal ornaments, it seems to be an important element in the title, that the wife should be seen to wear them at intervals. Particularly is this true where the husband kept them in his own possession, for otherwise it might be said that he never gave them to her. But it is enough to establish her claim that he had allowed her to wear them on birthdays or other suitable occasions.[88]

Paraphernalia would seem to be so far personal to the widow, that if not claimed by her during her lifetime, they cannot after her death be demanded by her executor or administrator. Accord-

82. Tllexan v. Wilson, 43 Me. 186.

83. See Com. Dig. Baron & Feme, Paraphernalia.

84. Jervoise v. Jervoise, 17 Beav. 566.

85. Calmady v. Calmady, 11 Vin. Abr. 181, 182.

86. 1 Rolle, 911, L. 35; Com. Dig. Baron & Feme, Paraphernalia.

87. *Ib.*; Macq. Hus. & Wife, 148.

88. Graham v. Londonderry, 3 Atk. 393.

ingly, it is held that if the husband should bequeath them to her for life and then over, and she should make no election to have them as her paraphernal goods, her representative after her decease would be excluded.[89] But in a recent English case, not only was the committee of the widow, being a lunatic, permitted to elect in her stead while she remained alive; but upon her subsequent death, her next of kin were allowed to come in and choose whether to take the *paraphernalia* or the benefits given her under her husband's will; and, upon their choice of the former an order in chancery was made accordingly.[90]

§ 1449. Incidents of Paraphernalia.

The wife's paraphernal property is subject to her husband's debts during his life; for in truth it is not then her property at all.[91] Nor can she maintain an indictment against any one who steals it, while her husband is alive.[92] So, too, it is liable for his debts after his death, when there is a deficiency of assets in the administrator's hands.[93] But even then her necessary clothing is protected; for, in the words of an ancient judicial resolution, "She ought not to be naked or exposed to shame and cold."[94] And in many of the United States there are at the present day statutes which justly reserve to the widow, in any event, necessaries in the house at the time of her husband's death, and the ornaments and clothing of herself and children.[95]

If a husband pawn his wife's *paraphernalia* as collateral security for money borrowed, and give power to the lender to sell

89. Macq. Hus. & Wife, 150; Clarges v. Albemarle, 2 Vern. 246; Com. Dig. Baron & Feme, Paraphernalia.

90. *In re* Hewson, 23 E. L. & Eq. 283.

91. Tllexan v. Wilson, 43 Me. 186; 1 Bright Hus. & Wife, 288.

92. State v. Hays, 21 Ind. 288.

93. 2 Bl. Com. 436; Macq. Hus. & Wife, 147, 149; Snelson v. Corbet, 3 Atk. 369; Howard v. Menifee, 5 Pike, 668; Ridout v. Earl of Plymouth, 2 Atk. 104.

94. 1 Rolle, 911, L. 35, cited in Macq. Hus. & Wife, 147.

95. See Mass. Gen. Stats., ch. 96, §§ 4, 5; Ginochio v. Porcella, 3 Bradf. Sur. 277.

for a sum certain during his absence, this will not be deemed an absolute alienation, but shall stand as a pledge redeemable by the widow; and if the husband have left sufficient to redeem (after payment of all his debts), she is entitled, under the rules of equity, to have the redemption money raised out of his personal estate.[96] But creditors must first be satisfied in all cases; though the widow's right in respect of such property is superior to that of any legatee of the husband.[97]

Real estate is to be appropriated, in payment of the husband's debts after his death, before the widow's paraphernal property can be held subject to the demands of his creditors. Such at least is the English practice; and where paraphernal property has been used up by the executor or administrator in satisfaction of specialty debts, the widow is allowed, in equity, to stand in their stead to reimburse herself out of the real estate in possession of the heir.[98] In this country a summary sale of the husband's real estate, under direction of the Probate Court, is usually requisite, where the personal assets in the hands of his executor or administrator prove inadequate to meet the debts, whether by specialty or simple contract.[99]

Letters written to a wife by a former husband belong to her and

96. Graham v. Londonderry, 3 Atk. 393. In *Re* Harrall, 31 N. J. Eq. 101, this same rule is applied in equity to the guardian of a lunatic husband, who pawned the wife's jewels, while sane, to pay his personal expenses, the lunatic's estate being ample. Here the lunatic was still alive, which makes the case somewhat anomalous; though, *semble*, a wife's ornaments were here treated as her separate property.

97. *Ib.*; Tipping v. Tipping, 1 P. Wms. 729; Ridout v. Earl of Plymouth, 2 Atk. 104; Burton v. Pierpont, 2 P. Wms. 80. And even though contingent assets come to hand afterwards, the wife's claim is gone. *Ib.*

98. Snelson v. Corbet, 3 Atk. 370; Aldrich v. Cooper, 8 Ves. 397; 2 Roper Hus. & Wife, 144; Macq. Hus. & Wife, 149. Probably in England, since the statute 3 & 4 Will. IV., ch. 104, which makes lands of all kinds assets for the payment of debts, the lands are absolutely assets for satisfaction of the widow's claim. Bell Hus. & Wife, 215.

99. An English writer of excellent authority on this subject distinguishes between the case where the devised estate is subject to a charge or trust for the payment of debts

not to his estate; and her own gift of them is valid as against the executor of such estate or her second husband.[1]

§ 1450. Wife's Equity of Exoneration.

To the wife also belongs the right in equity to have her estate exonerated out of her husband's personal and real assets. This is known as the wife's equity of exoneration. The principle is that the wife, when mortgaging her property for her husband's debt, stands in the position of a surety, and therefore may claim indemnity from the principal for whose benefit her security was interposed.[2] Lord Hardwicke has announced this rule with clearness and precision.[3] The husband's other creditors have no preference over the wife on marshalling the assets of her husband's estate; but she is entitled to the benefit of any securities, and to have satisfaction of her debt according to its rank. But the widow may waive her right of exoneration from the estate of her deceased husband, and her waiver will be inferred from circumstances.[4]

In this country, as we have seen, the wife is regarded as her husband's surety, and the presumptions are in her favor.[5] The

from the case where the devised estate is not so subjected. In the former case he holds the widow entitled to have the assets marshalled as against the devisee; but not in the latter case. Note by Mr. Jacob to 2 Roper Hus. & Wife, 145. We find no authority to support this distinction. It would certainly trench closely upon her right to hold such property against all bequests of her husband to others; a right which is clearly admitted in the English courts. 2 Bl. Com. 436. A bequest from husband to wife of all the household goods, furniture, plate, jewels, and the like (including what in point of fact are *paraphernalia*), does not debar the widow from claiming her paraphernal property as such, if she chooses to set up her lawful privilege as against her husband's bequest. Marshall v. Blew, 2 Atk. 217; *In re* Hewson, 23 E. L. & Eq. 283.

1. Grigsby v. Breckenridge, 2 Bush, 480.

2. Macq. Hus. & Wife, 181; Bell Hus. & Wife, 195; Wotton v. Hele, 2 Saund. 177; 1 Mod. 290.

3. Robinson v. Gee, 1 Ves. Sen. 252, per Lord Hardwicke; Parteriche v. Powlet, 2 Atk. 384; and see Lord Thurlow, in Clinton v. Hooper, 1 Ves. Jr. 186, to the same effect.

4. Bell Hus. & Wife, 195; Clinton v. Hooper, 1 Ves. Jr. 188. But see Lancaster v. Evors, 10 Beav. 154.

5. See *supra*, § 472.

rule as to her equity of redemption is doubtless quite as liberal as that laid down by Lord Redesdale in England. Perhaps it is more so, but authoritative cases on this point are wanting, and recent statutes affect the whole subject. In New York the widow's right of exoneration is expressly admitted.[6] And in other States the wife's rights as surety, with reference to debts of her late husband, for which she has mortgaged her land, are very strongly favored.[7]

Where the property mortgaged is the wife's separate land, not only must her right to exoneration be a strong one,[8] but the presumption in her favor as to retaining the equity of redemption to herself must be well nigh conclusive, unless it is apparent that she intentionally surrendered her right, and for a fair equivalent.[9] In general, as to the wife's separate property or its income, where the circumstances do not warrant the inference of her assent or acquiescence to the appropriation thereof by her husband, or in his mode of applying it, she may claim reimbursement out of his estate.[10]

§ 1451. Widow's Right and Duty to Bury Husband.

The common-law obligation of the widow to bury her deceased husband rests upon weaker foundations than the corresponding obligation of the husband. In truth it seems somewhat inconsistent with the doctrine of coverture; for why, it may be asked, should a woman answer for the indigence of one whose lawful privilege it was to strip her of her own means of support? Where the husband leaves an estate, the funeral expenses are to be paid by his executor or administrator, and not by his widow. This is the rule both in England and America; and it is doubtless reason-

6. Vartie v. Underwood, 18 Barb. 561.

7. Philbrooks v. McEwen, 29 Ind. 347; Hetherington v. Hixon, 46 Ala. 297; *supra*, § 472, and cases cited.

8. See Kinner v. Walsh, 44 Mo. 65; *supra*, § 472.

9. *Supra*, § 472, and cases cited.

10. *Supra*, § 553. But such claims, especially of income, are by no means to be favored without good proof. Hill v. Hill, 38 Md. 183. And the usual Statute of Limitations will run against them. Sabel v. Slingluff, 52 Md. 132.

able so far as it goes.[11] But in an English case, decided not many years ago, the court seemed to regard this subject somewhat differently, and intimated that husband and wife should stand upon a like footing as regarded the obligation of burying one another.[12] Here a widow, who was also an infant, was held bound by her contract for the expense of her husband's interment. The decision proceeded upon the ingenious doctrine that, since a husband ought to bury his wife and lawful children, who are the *personæ conjunctæ* with him, as a matter of personal benefit to himself, the wife should do the same by her husband, as a benefit and comfort to herself; and therefore that the case comes within the rule of law which makes a contract good where the infant is a gainer by it. If the husband's estate is sufficient, it ought to bear the expense of his burial.

§ 1452. Quarantine.

The Magna Charta of Henry III, which established and defined the rule of dower for future guidance, besides relieving the widow of certain burdens imposed upon heirs at the feudal law, distinctly set forth the proportion of which she should be endowed in her husband's lands, and further provided that she might tarry forty days after her husband's death in her husband's house.[13] This last privilege has been since known as the widow's *quarantine,* and has been recognized by statute law in some of the United States.[14] It was designed manifestly as something preliminary to the assignment of dower; and some statutes attach this explicit sense to the privilege.

11. 2 Redf. Wills, 224; 2 Wms. Ex'rs, 871; Macq. Hus. & Wife, 183.

12. Chapple v. Cooper, 13 M. & W. 252.

13. 2 Bl. Com. 135.

14. Mass. Gen. Stats., ch. 96, §§ 4, 5; Whaley v. Whaley, 50 Mis. 577; Craige v. Morris, 25 N. J. Eq. 467; Calhoun v. Calhoun, 58 Ga. 247; Young v. Estes, 59 Me. 441; Doane v. Walker, Ill. 1881. In connecticut, a widow, before the assignment of dower to her, is a tenant in common with the heirs. Wooster v. Iron Co., 38 Conn. 256.

CHAPTER XII.

HOMESTEAD.

SECTION 1453. Homestead System in the United States.
1454. Election Between Dower and Homestead.
1455. Desertion by Husband.
1456. Desertion by Wife.
1457. Marshaling Assets to Pay Liens.
1458. Insurable Interests.
1459. Remarriage by Widow.

§ 1453. Homestead System in the United States.

The homestead may properly be considered in connection with dower; for although this right is not strictly personal to married women, inasmuch as it exists for the benefit of both wife and children, if not for the husband besides, while he lives, it is an encumbrance upon the real estate of the husband which is generally released by the wife in connection with her dower. The homestead system is of recent origin, is peculiar to our American States, and exists for protection mainly against the husband's creditors. The policy on which it rests, by no means a new one in our legislation, is that a householder with a family shall always have a place of shelter where legal process cannot reach him. While open to some serious objections as concerns the rights of creditors, the homestead system is to be warmly commended in respect of the encouragement it affords to agriculture, and still more as offering rewards for domestic fidelity.[15]

§ 1454. Election Between Dower and Homestead.

Usually it is held that a widow cannot have both dower and homestead, and must elect between the two [16] within a reasonable

15. See 1 Washb. Real Prop., 4th ed. 342 *et seq.*, where this system is detailed. And see Cipperley v. Rhodes, 53 Ill. 346; West v. Ward, 26 Wis. 579; Thoms v. Thoms, 45 Miss. 263.

16. Merritt v. Merritt, 97 Ill. 243; Miller v. Hammond, 126 Ill. App.

time after the death of her husband,[17] but in some States the homestead right is in addition to dower.[18] Where she does not elect to take homestead, it is presumed that she elects dower.[19] Where she elects dower, homestead is waived.[20] Where she elects homestead she waives dower.[21] If she elects dower, the rights of the children attach to the homestead.[22]

267; Sansberry v. Sims' Adm'x, 79 Ky. 527, 3 Ky. Law Rep. 303; Phillips v. Williams, 130 Ky. 773, 113 S. W. 908; Redmond's Adm'x v. Redmond, 112 Ky. 760, 23 Ky. Law Rep. 2161, 66 S. W. 745; Middleton v. Fields, 142 Ky. 352, 134 S. W. 180.

17. White v. Holder, Ky. 1909, 118 S. W. 995.

18. Jameson v. Jameson, 117 Ark. 142, 173 S. W. 851; Cowdrey v. Cowdrey, 131 Mass. 186; Weller v. Weller, 131 Mass. 446; Showers v. Robinson, 43 Mich. 502.

19. Peebles v. Bunting, 103 Ia. 489, 73 N. W. 882; Ball v. Ball, 165 Mo. 312, 65 S. W. 552.

20. In Arkansas a widow may claim her unassigned dower after abandoning the homestead. Griffin v. Dunn, 79 Ark. 408, 96 S. W. 190; Edinger v. Bain, 125 Ia. 391, 98 N. W. 568; Burch v. Atchison, 82 Ky. 585, 6 Ky. Law Rep. 636.

The Missouri statute providing that a widow's homestead rights shall be forfeited on remarriage, does not apply to her dower rights. Chrisman v. Linderman, 202 Mo. 605, 100 S. W. 1090, 10 L. R. A. (N. S.) 1205.

Where homestead is thus forfeited, the widow, on remarriage, is entitled to dower. Jordan v. Rudluff (Mo.), 174 S. W. 806; Kennedy v. Kenendy, 74 S. C. 541, 54 S. E. 773; Geiger v. Geiger, 57 S. C. 521, 35 S. E. 1031; Chrisman v. Linderman, 202 Mo. 605, 100 S. W. 1090, 10 L. R. A. (N. S.) 1205; McFadin v. Board, 188 Mo. 688, 87 S. W. 948.

21. In Georgia, where a widow is the sole beneficiary of a homestead and takes a year's support therefrom, which does not include the entire homestead, she can also take dower out of the remainder. Cook v. Cook, 138 Ga. 88, 74 S. E. 795; Carver v. Elmore, 147 Ky. 521, 144 S. W. 1062.

That a widow remains in the house of her husband for a few years after his death is not conclusive that she has elected to take a homestead, instead of dower. Phillips v. Williams, 130 Ky. 773, 113 S. W. 908; Jones v. Green, 26 Ky. Law Rep. 1191, 83 S. W. 582; Deboe v. Rushing, 21 Ky. Law Rep. 423, 51 S. W. 613; Freeman v. Mills, 22 Ky. Law Rep. 859, 59 S. W. 3; Kimberlin v. Isaacs, 23 Ky. Law Rep. 42, 62 S. W. 494.

22. Hanna's Assignees v. Gay, 117 Ky. 695, 25 Ky. Law Rep. 1794, 78 S. W. 915.

In Kentucky, where a widow elects dower after claiming a homestead, she must furnish a homestead to the chilren. Warren's Adm'r v. Warren, 126 Ky. 692, 32 Ky. Law Rep. 82, 104 S. W. 1199.

§ 1455. Desertion by Husband.

Homestead provisions should be liberally construed in the interest of the family home so long as they are not made an instrument of fraud on creditors. Where the husband has absconded, deserting his wife and leaving her residing in the State with children depending upon her, the wife is the head of the family within the meaning of the homestead exemption laws.[23]

The mere fact that a husband abandons his wife does not give her the right to make a deed of his homestead land without his signature, and does not estop him from claiming as against the grantees under the wife's deed who took in the belief that the wife was unmarried. To create an estoppel there must be some act on the part of the husband leading the grantees to think that the wife was unmarried, and a mere wrongful abandonment is not enough.[24]

§ 1456. Desertion by Wife.

Where the Constitution provides that the homestead shall not be sold without the consent of the wife, a deed made by the husband alone is void, even though the wife has voluntarily left the husband. The court has no right to engraft an exception on the Constitution.[25]

§ 1457. Marshaling Assets to Pay Liens.

Where husband and wife are occupying certain property as a homestead, and on his death his widow continues to occupy it, she is entitled to have set off to her one-third in value of the land so as to include the residence and buildings, and the mortgages should be paid out of the proceeds of the remaining two-thirds. The

23. Jetton Lumber Co. v. Hall, 67 Fla. 61, 64 So. 440, 51 L. R. A. (N. S.) 1121.

24. Somers v. Somers, 27 S. D. 500, 131 N. W. 1091, 36 L. R. A. (N. S.) 1024. See also Couch v. Capitol Bldg. & L. Ass'n, — Tenn. —, 64 S. W. 340. See, *contra*, Mabry v. Citizens' Lumbr Co., 47 Tex. Civ. App. 443, 105 S. W. 1156.

25. Whelan v. Adams, 44 Okla. 696, 145 P. 1158, L. R. A. 1915D, 551.

policy of the law is to protect the homestead in so far as such may be done without lessening the superior rights of creditors.[26]

§ 1458. Insurable Interests.

Under statutes giving the wife certain interests in the homestead property, the title to which is in the husband, she has an insurable interest in it,[27] and the husband has an insurable interest in the homestead standing in the name of the wife.[28]

§ 1459. Remarriage by Widow.

Homestead rights given by statute to a "widow" should be liberally construed, and are not confined to the woman until she marries again, but her rights are retained even although she does marry again. A widow is a person who has outlived her husband, and this case follows the general rule that whenever a right by law attaches by reason of a person being a widow, that right remains unless taken away by statute.[29]

A wife does not lose her homestead rights under her first husband by moving to other lands which she occupies as a homestead with her second husband, renting the first homestead, and she does not lose the right to claim under her second homestead by the fact that she has other interests in real estate, whether acquired from a former husband or not.[30]

26. Haynes v. Rolstin, 164 Ia. 180, 145 N. W. 336, 52 L. R. A. (N. S.) 540.

27. Bacot v. Phoenix Ins. Co., 96 Miss. 223, 50 So. 729, 25 L. R. A. (N. S.) 1226; State Mutual Ins. Co. v. Green, — Okla. —, 166 P. 105, L. R. A. 1917F, 663.

28. Kludt v. German Mut. F. Ins. Co., 152 Wis. 637, 140 N. W. 321, 45 L. R. A. (N. S.) 1131.

29. Davis v. Neal, 100 Ark. 399, 140 S. W. 278, L. R. A. 1916A 999.

30. Smith v. Rittenhouse, 260 Ill. 599, 103 N. E. 569, L. R. A. 1916A, 995.

PART X.

DIVORCE.

CHAPTER I.

HISTORY OF DIVORCE.

SECTION 1460. History of Divorce.
1461. Divorce as Known to the Ancients.
1462. Jewish and Christian Views of Divorce.
1463. Diversity of Divorce Laws in England and America.
1464. Divorce Among Modern Christian Nations.

§ 1460. History of Divorce.

There has been divorce in some form since the dawn of history. Under the Mosaic law the husband could write the wife a bill of divorcement and send her away, and she could go and become another man's wife. (Deuteronomy, chapter 24.) About the beginning of the Christian era there arose two famed schools of the law at Jerusalem. One, under Shammai, taught that divorce was unlawful except for adultery; the more popular one, under Hillel, authorized divorce for any cause. With the early Romans divorce was at the will of the husband, and later, upon the agreement of the parties. In more modern times in all civilized countries divorce has been subject to the limitations or consent of the State or church in control. In England, at the time of the secession of the colonies and for a long time previously, divorce from bed and board had been allowed by the ecclesiastical courts, and absolute divorces to a favored few by special acts of Parliament. Otherwise divorces were not granted at common law, and there was no general act of Parliament authorizing them and no jurisdiction in

the chancery or common-law courts to grant divorces until eighty-one years after the Declaration of Independence.

As there were no ecclesiastical courts in this country, divorces were granted by special act of the legislature, and later, in most States, under general statutory provisions. As Congress has only such powers as are specifically granted or implied under the provisions of the Constitution of the United States, and as there is no inherent or inherited power in the courts of this country to grant divorces, it follows that our tribunals have no jurisdiction or authority in regard to divorces except such as may be conferred upon them by the legislature.[31]

§ 1461. Divorce as Known to the Ancients.

The ancient nations, all recognizing the necessity of some divorce legislation, differed in their methods of treatment. Among the Greeks, despite their intellectual refinement, the marriage institution was degraded, even in the palmiest days of Athens. The husband could send away his wife, and the wife could leave her husband. The procedure in such cases was quite simple, being apparently nothing more than a formal notice filed with the judicial magistrate, unless the parties were disposed to contend; in which case they went to trial. If they agreed to be divorced, that would be enough; hence the law was in their own hands; and, if divorced, they might marry again at pleasure.[32] In Rome, more of the moral and religious element prevailed; and so strictly was marriage respected in the early days, that no divorce is supposed to have occurred for more than five hundred years from the foundation of the city; if, indeed, we may fix the year of such foundation. The first recorded instance is, however, that of Spurius Carvilius Ruga, B. C. 231; and even this was a case of barren-

31. Worthington v. District Court (Nev.), 142 P. 230, L. R. A. 1916A, 696.

32. See p. 31 of Dr. Woolsey's Treatise on Divorce and Divorce Legislation, a little work which exhibits much careful research and scholarship, and clearly presents the legislation of England and America affecting this subject.

ness, which hence fell possibly under the modern head of void and voidable marriages.[33] But ancient Rome was built on family discipline, rather than domestic love; the husband exercised full sway, and the stately and somewhat severe Roman matron, who developed under influences at first adverse in appearance, disappeared entirely in the later dissolute and corrupt years of the Roman republic, and before an empire succeeded it.[34]

§ 1462. Jewish and Christian Views of Divorce.

The ideal of marriage among the Hebrews was high: that husband and wife should cleave together and be one flesh; nevertheless, the usage of this nation, founded upon the Mosaic code, permitted the husband, as it would seem, to dismiss his wife at pleasure.[35]

It was this latter custom which called forth the merited rebuke of Christ, and occasioned him more than once to suggest a higher standard of marital constancy. These suggestions many have construed into an absolute prohibition of divorce except for the cause of adultery. Without accepting this construction of Scripture as the true one, or admitting all of the forced conclusions of commentators, which, whether correct or incorrect, must ever remain a matter for unsettled controversy,[36] we may clearly trace in the

33. Woolsey Div. 41.

34. Horace devined a true cause of Rome's decay, when he wrote —

"Fecunda culpæ secula nuptias
Primum inquinavere et genus et domos.
Hoc fonte derivata clades
In patriam populumque fluxit."
Carm. Lib. iii. 6.

See Woolsey Div. 44 *et seq.*, where some of the historical instances are cited.

35. Deut. xxiv.; Woolsey Div. 24.

36. For the discussion of this question the reader is referred to Woolsey Div. 51 *et seq.*, where it will be perceived that writers on these New Testament texts are diametrically opposed to one another. The passages important to the issue are Matt. v. 31, 32; xix. 3–9; Mark x. 2–12; Luke xvi. 18. The present writer merely reminds strict constructionists of that well-known instance, which, though Biblical scholars may discard, laymen still believe authentic, where Christ refused to cast a stone at the adulterous woman, and bade her go and sin no more, as evincing that the great Christian Teacher had no design of ingrafting his code of morals, as a mere amendment, upon the Mosaic

New Testament writings an intent to bring into prominence the moral obligations of the marriage state, to discountenance lax and temporary unions, and to warn the legislator that those whom God hath joined man may not with impunity put asunder for any trivial cause.

§ 1463. Diversity of Divorce Laws in England and America.

Divorce laws have constantly given rise to most interesting and earnest discussions; and men differ very widely in their conclusions, while all admit the subject to be of the most vital importance to the peace of families and the welfare of nations. Some favor a rigid divorce system as most conducive to the moral health of the people; others urge a lax system on the same grounds. On two points only do English and American jurists seem to agree: first, that the government has the right to dissolve a marriage during the lifetime of both parties, provided the reasons are weighty; second, that, unless those reasons are weighty, husband and wife should be divorced only by the hand of death.

§ 1464. Divorce Among Modern Christian Nations.

The influence of Christianity has been felt in modern Europe; spreading to England, whence, too, it was brought to the wilds of America; the Christian rule ever shaping the policy of government. But this rule has received different methods of interpretation.[37] The Church of Rome treats marriage as a sacrament, and indissoluble without a special dispensation, even for adultery. Protestants are divided; all regarding adultery as a sufficient

divorce law; which, as we understand it, would then have signified that a husband might "put away" his wife for adultery and have her stoned to death; that the wife could get no divorce at all; and that government was not concerned in the matter. Even Dr. Woolsey seems compelled to admit that St. Paul sanctioned divorce for desertion. See his comments (p. 70 *et seq.*) upon 1 Cor. vii. 15. While it may well be doubted whether the New Testament prescribes an inflexible code to bind all legislators, it is clear that all approach to "free marriage" is therein discountenanced.

37. Woolsey Div. 87 *et seq.*

cause of divorce, many considering desertion equally so, others cruelty; while a strong current of authority in this country tends to multiply the legal occasions for divorce even down to such pretexts as incompatibility of temper.[38] So loose, indeed, and so confusing, is our State marriage and divorce legislation becoming, that it might be well to ask whether the cause of morality would not be promoted if, by constitutional amendment, the whole subject were placed in the control of the general government; so that, at least, one uniform system could be applied, and the experiments of well-meaning reformers be subjected to an unerring and crucial test.[39]

We have already commented upon the growing laxity of marriage in the United States as a civil institution. Here the moralist is confronted with two serious difficulties: *first,* in our universal tendency to greater social freedom as between the sexes, women themselves pressing for it; *second,* in the existence of thirty or forty distinct and independent jurisdictions over matters pertaining to marriage and divorce. Citizens of this Union, traveling readily from one State to another, find facilities for divorce and re-marriage always at hand; for sham divorce and sham re-marriage, perhaps, but for divorce and re-marriage sufficient to keep guilty parties in countenance, and perplex the tribunals which must apply the law.

An era of social and political revolution, such as the American people have lately passed through, is often succeeded by one conservative or slightly reactionary, just as the top gyrates in narrower circles when it steadies itself. But at the present rate, and in the present direction, there is danger lest the sanction of the courts to marriage and divorce be practically superseded during the next century by private discretion and individualism. It has

38. Woolsey Div. 205.

39. *This for-sighted suggestion* of the learned author was written more than thirty years ago and the subject is coming to be more and more of pressing importance. There is now a well-organized movement on foot to accomplish the same result by the passage of uniform divorce laws in the different States.— Editor.

been affirmed of our republic, and correctly, that "a nation of Mormons would be impossible, but not so one of libertines." [40]

40. A writer in the *International Review*, August, 1881, shows how a man may, under the present conflict of divorce laws in the several United States, acquire by the complications of domicile, a number of wives, all lawful in a certain sense, and yet, of course, in strict truth, unlawful.

On the continent of Europe a similar confusion may be found, as, for instance, between France and Switzerland. As for Switzerland, according to a writer in the *London Guardian*, not only may a man thus have two lawful wives, but divorce is obtainable in that country by mutual consent; albeit this facility arises rather from the practice of the courts than from the letter of the law, which is to the effect that when the judge is of opinion that there are circumstances "which render the life in common insupportable," he may, on the joint application of a married couple, dissolve their marriage. The practice of the courts being to regard a joint demand for divorce as a circumstance that renders life in common insupportable, divorce is practically procured by mutual consent. This writer adds that people in Switzerland, especially among the working classes, take each other on trial; the expressed understanding being that, after a certain time, if they do not get on well together, or desire a change, they shall join in an application for divorce. *London Guardian*, August, 1881.

CHAPTER II.

NATURE AND FORM OF REMEDY.

SECTION 1465. Judicial in Nature.
1466. Whether at Law or in Equity.
1467. Whether *in Rem* or *in Personam*.
1468. Right to Divorce Based on Statute Alone.
1469. Special Legislation Valid.
1470. Legislative Divorces in England.
1471. Legislative Divorces in This Country.
1472. Effect of Legislative Divorce on Property Rights.
1473. Legislative Interference with Judicial Divorce.
1474. Necessity of Separate Proceedings.
1475. No Specific Performance of Marriage.
1476. Judicial Divorce; Grounds; Divorce from Bed and Board and from Bonds of Matrimony.
1477. Election by the Aggrieved Spouse as Between the Different Kinds of Divorce.
1478. The Public as a Party in Divorce Suits.
1479. Contracts or Other Proceedings Encouraging Divorces Illegal.
1480. Discontinuance of Action for Nullity May Be Refused.

§ 1465. Judicial in Nature.

The proceedings are judicial in their nature, and a divorce can be granted only for sufficient cause and after the other party has been given a sufficient chance to defend.[41]

Proceedings for divorce are civil cases and should be conducted like other civil cases in the absence of a statute to the contrary,[42] but are in many respects *sui generis*.[43]

The courts alone have authority to decree a divorce, and no divorce or separation ordered or allowed under the rules of any church can have any effect whatever.[44]

41. *In re* Christensen's Estate, 17 Utah, 412, 53 P. 1003, 70 Am. St. R. 794, 41 L. R. A. 504.

42. Cohen v. Cohen, 84 A. 122; Powell v. Powell, 104 Ind. 18, 3 N. A. 639; Reed v. Reed, 101 Mo. App. 176, 70 S. W. 505.

43. Milster v. Milster (Mo. App.), 209 S. W. 620.

44. Hilton v. Roylance, 25 Utah,

§ 1466. Whether at Law or in Equity.

Divorce proceedings are commonly at law,[45] and actions for divorce are statutory purely, except that where the statute is silent the rules of equity are followed,[46] and the court may apply equitable principles.[47]

In some States the courts in divorce cases are governed by the rules of the ecclesiastical courts.[48]

§ 1467. Whether in Rem or in Personam.

An action for divorce is commonly said to be *in rem*,[49] but where the defendant appears and joins issue by answer the nature of the proceeding is thereby changed from a proceeding *in rem* to one *in personam*.[50]

§ 1468. Right to Divorce Based on Statute Alone.

When the American colonies adopted the common law they did not adopt the ecclesiastical law relating to divorce, so that no American court has jurisdiction to grant divorce apart from statute,[51] and jurisdiction over divorce is purely statutory, and every power exercised by the courts with reference to it must be found in the statutes or it does not exist.[52]

129, 69 P. 660, 95 Am. St. R. 821, 58 L. R. A. 723, "church divorce" of Mormon church. See Stilman v. Stilman, 174 N. Y. S. 385 (describing Hebrew "get").

45. Chapman v. Chapman, 194 Mo. App. 483, 185 S. W. 221, 269 Mo. 663, 192 S. W. 448.

46. People *ex rel.* Levine v. Shea, 201 N. Y. 471, 94 N. E. 100.

47. Johannessen v. Johannessen, 128 N. Y. S. 892, 70 Misc. 361.

48. Emerson v. Emerson, 120 Md. 584, 87 A. 1033.

49. Lister v. Lister, 86 N. J. Eq. 30, 97 A. 170. See, however, Toncray v. Toncray (Tenn.), 131 S. W. 977, 34 L. R. A. (N. S.) 1106. See, further, discussion of the question under foreign divorces, *post*.

50. Gibbs v. Gibbs, 26 Utah, 382, 73 P. 641.

51. Cotter v. Cotter, 225 F. 471, 139 C. C. A. 453; Hodges v. Hodges (N. M.), 159 P. 1007.

52. Williams v. Williams, 136 Ky. 71, 123 S. W. 337; Outlaw v. Outlaw, 118 Md. 498, 84 A. 383; Dimpfel v. Wilson, 107 Md. 329, 68 A. 561, 13 L. R. A. (N. S.) 1180; Baugh v. Baugh, 37 Mich. 59, 26 Am. R. 495; Humber v. Humber, 68 So. 161; Chapman v. Chapman, 194 Mo. App. 483, 185 S. W. 221, 269 Mo. 663, 192

The legislature may prescribe the grounds on which divorces may be granted and the conditions as to residence of parties and limitations of action as it deems necessary.[53]

The authority given to grant divorce, though statutory, carries with it such powers as are expressly given and such as may be incidental to its exercise.[54]

§ 1469. Special Legislation Valid.

Proceedings for divorce are special in nature and special legislation as to them will be valid.[55]

A provision that one year's residence in the State is necessary to give the court jurisdiction in divorce is not void as a special law, as it is well settled that reasonable classifications in a legislative act are not inimical to constitutional provisions against the passage of special laws.[56]

§ 1470. Legislative Divorces in England.

All private agreements between the married parties to dissolve their relation are void in England and the United States, being contrary to the fundamental principle, long cherished by Christian

S. W. 448; Rumping v. Rumping, 36 Mont. 39, 91 P. 1057, 12 L. R. A. (N. S.) 1197; Cizek v. Cizek, 76 Neb. 797, 107 N. W. 1012; Cisek v. Cisek, 76 Neb. 797, 99 N. W. 28; Worthington v. District Court of Second Judicial Dist. in and for Washoe County, 37 Nev. 212, 142 P. 230; (1910) Ackerman v. Ackerman, 93 N. E. 192, 200 N. Y. 72, affirming judgment (1908) 108 N. Y. S. 534, 123 App. Div. 750; Gibson v. Gibson, 143 N. Y. S. 37, 81 Misc. 508; Pollitzer v. Pollitzer, 165 N. Y. S. 953, 178 App. Div. 744; Baughman v. Baughman, 34 Pa. Super. Ct. 271; Gilbert v. Hayward, 37 R. I. 303, 92 A. 625; Crow v. Crow (R. I.), 103 A. 739; Ruge v. Ruge (Wash.), 165 P. 1063; Martin v. Martin, 167 Wis. 255, 167 N. W. 304.

53. Franklin v. Franklin, 40 Mont. 348, 106 P. 353; Mauser v. Mauser, 59 Pa. Super. Ct. 275.

54. White v. White, 138 N. Y. S. 1082, 154 App. Div. 250; De Vall v. De Vall, 57 Ore. 128, 109 P. 755.

55. Deyoe v. Superior Court, 140 Cal. 476, 74 P. 28, 98 Am. St. R. 73; Ewing v. Ewing, 24 Ind. 468, *ib.*, 25 Ind. 155; Noel v. Ewing, 9 Ind. 37; Wilson v. Wilson, 134 Tenn. 697, 185 S. W. 718 (divorce factors).

56. Worthington v. District Court (Nev.), 142 P. 230, L. R. A. 1916A 696.

nations, that government must interpose whenever a conjugal dissolution is sought. We are led, moreover, to regard the legislature as prescribing the rules and defining the policy of divorce, while the courts, on the other hand, apply those rules and that policy to such cases as may arise. But the legislature itself may dissolve a particular marriage, just as it may provide for the dissolution of marriage generally; for private or special acts are, like public statutes, within the recognized province of legislation.

The English Parliament, whose functions may be pronounced omnipotent within English jurisdiction, used, in fact, to pass special acts of divorce upon private petition for a long period prior to 1858; inasmuch as the ecclesiastical courts steadily refused from 1601, if not earlier, to divorce parties from the bond of matrimony, whatever the cause alleged, and decreeing nothing more than a legal separation from bed and board upon just cause. This ecclesiastical decree affording to the injured little consolation, and requiring an innocent party to curb natural appetites more than ever, husbands whose wives were guilty of adultery began to apply to Parliament to declare their infelicitous marriage dissolved, and in 1669, as it appears, the first prayer of this kind was granted, the petitioner having previously procured a decree of separation in the spiritual court.[57] It is observable that this expensive and tedious process was practically confined, during the seventeenth century, to three injured persons, and they members of the British peerage; that during some one hundred and seventy years after the system of parliamentary divorce was established, the remedy was never awarded and probably never sought without some charge of adultery as a basis; and that while an innocent husband might thus be set free from an adulterous wife, almost as of course, an innocent wife could not so readily cast off the legal companionship of an adulterous husband.[58] Later still, the English divorce statutes of 1858 have practically dispensed with the

57. Lord de Roos here obtained a divorce from Lady de Roos. Macq. H. L. Pract. 471, 551.

58. Macq. H. L. Pract. 473.

legislative divorce for special cases, which divorce had always been cautiously granted.

§ 1471. Legislative Divorces in This Country.

Legislative divorces are not unknown in American States; though, as Mr. Bishop says, the practice, which was imported from England, prevailed here more in earlier times than at present. Sometimes the local legislature has administered its remedies concurrently with the courts; sometimes it has divorced from bed and board, though more commonly from the bonds of matrimony; sometimes its act has operated dissolution at once, and sometimes referred the case to some judicial tribunal for full investigation and proper action.[59]

Divorce might formerly be granted by the Governor and Council in the Colony days,[60] and it was for a long period quite customary for divorces to be granted by the legislature, and such divorces have been sustained by our highest courts,[61] even when granted without notice to the libellee.[62] The practice is now, however, universally discontinued.

Objectionable as the legislative method is, from its cumbersomeness, cost, and the little real opportunity for an impartial hearing before such a body, we may regard it as perfectly legal in American States, unless constitutional objections apply; objections which of course are inapplicable to an English Parliament.

As to constitutional objections, decisions differ in different States, like the provisions of different State constitutions. But it may be fairly affirmed that no objection is tenable under the Constitution of the United States as to legislative divorces, such divorces impairing no "obligation of contracts," words which, in

59. Young v. Naylor, 1 Hill Eq. 383; Berthelemy v. Johnston, 3 B. Monr. 90.

60. Gage v. Gage (Mass. 1782), 2 Dane Abr. 309; Shannon v. Shannon, 68 Mass. (2 Gray) 287.

61. Noel v. Ewing, 9 Ind. 37; Maynard v. Hill, 125 U. S. 190, 8 Sup. Ct. 723.

62. Cronise v. Cronise, 54 Pa. St. 255.

the rational sense of that instrument, have no reference to the family status.[63] Nor, to cite objections under the language of State constitutions, ought a legislative divorce to be pronounced invalid as a "retrospective law."[64] Nor, according to the better reasoning, is it void as an exercise of judicial power; though the separation of executive, legislative, and judiciary, is not, we may add, prescribed for in all States in terms identical, and such divorces were early condemned as an assumption of judicial power.[65] But as to this exercise of judicial power where a State constitution expressly prohibits the legislature from granting divorces,[66] or (to take the judicial standpoint) where the court may say that divorces for such a cause, or for all causes, come exclusively under their own jurisdiction,[67] or that a legislative divorce in the particular instance would amount to interference with a suit already pending properly before the courts;[68] here there may be found warrant for treating a legislative divorce as null and void. Where, under existing laws, the State court has no jurisdiction to dissolve the marriage, a legislative divorce has been pronounced good, there being no constitutional clause to the contrary.[69] But where the State constitution forbids special laws a special act granting a divorce is unconstitutional.[70]

63. See Story Confl. Laws, §§ 108, 200; Starr v. Pease, 8 Conn. 541; Starr v. Hamilton, 1 Deady (U. S.), 268; Adams v. Palmer, 51 Me. 480; Bingham v. Miller, 17 Ohio, 445; Cabell v. Cabell, 1 Met. (Ky.) 319; *contra,* Ponder v. Graham, 4 Fla. 23.

The Fourteenth Amendment to the Federal Constitution renders legislative divorces unconstitutional in the opinion of Hon. Simeon E. Baldwin as expressed in a learned article in 27 Harvard Law Review, 699.

64. West v. West, 2 Mass. 223; Starr v. Pease, 8 Conn. 541; Cabell v. Cabell, 1 Met. (Ky.) 319, etc. The statement in the text conforms to the decided weight of authority.

65. State v. Fry, 4 Mo. 120; Richeson v. Simmons, 47 Mo. 20.

66. Teft v. Teft, 3 Mich. 67.

67. Shannon v. Shannon, 2 Gray, 285, *per* Metcalf, J.

68. Gaines v. Gaines, 9 B. Monr. 295.

69. Adams v. Palmer, 51 Me. 480. Cf. Simonds v. Simonds, 103 Mass. 572.

70. Winkles v. Powell, 173 Ala. 46, 55 So. 536.

§ 1472. Effect of Legislative Divorce on Property Rights.

But the effect of a legislative divorce is in this country considerably restrained by constitutional law. As a State legislature cannot divest vested rights by any statute, neither is it permitted to impose alimony or take from the vested rights of one spouse in order to bestow property upon the other.[71] As the spouses thus divorced are, however, no longer enabled to fulfil the condition of widow or widower, it is considered, in conformity with the usual rule, that after a legislative divorce the divorced husband cannot become a complete tenant by the curtesy of his late wife's lands; nor the divorced wife, if she survive, take dower on the widow's allowance, since this would be no divesting of vested rights.[72]

§ 1473. Legislative Interference with Judicial Divorce.

It is an unwarrantable exercise of legislative authority to interfere with the status of existing judicial sentences of divorce. As, for instance, in Massachusetts, where a statute of 1874 provided, in contravention of the constitutional right of the courts to determine divorce causes, that all divorces *nisi* heretofore decreed under a statute of 1870 should "have the force and effect of absolute divorces from the bonds of matrimony." [73] But a statute modifying the remedy, where no judicial decree has been rendered before, is constitutional.[74]

§ 1474. Necessity of Separate Proceedings.

An action for an absolute divorce cannot be combined with a prayer for a limited divorce,[75] or with proceedings for separation,[76]

71. Crane v. Meginnis, 1 Gill & J. 463; Townsend v. Griffin, 4 Harring. 440; Jackson v. Sublett, 10 B. Monr. 467.

72. Starr v. Pease, 8 Conn. 541; Levins v. Sleator, 2 Greene, Ia. 604; Townsend v. Griffin, 4 Harring. 440.

73. Sparhawk v. Sparhawk, 116 Mass. 315.

74. Wales v. Wales, 119 Mass. 89; Hunt v. Hunt, 16 N. Y. Supr. 622.

75. Henry v. Henry, 17 Abb. Prac. (N. Y.) 411.

76. Conrad v. Conrad, 109 N. Y. S. 387, 124 App. Div. 780, affirming judgment (1907) 107 N. Y. S. 655, 56 Misc. 376.

but in Louisiana a decree for separation must precede an application for divorce based on abandonment.[77]

In some States a cause of action for adultery cannot be joined with one for cruelty.[78]

Proceedings for divorce cannot be joined with proceedings relating to property rights not growing out of the marriage relation.[79]

§ 1475. No Specific Performance of Marriage.

The principle of enforcing the specific performance of marriage vows, though perhaps theoretically commendable, proves in practice utterly futile, as was seen in the ecclesiastical remedy for restitution of conjugal rights, which fell into disrepute in England and was never permitted in this country, and there is no judicial power in this country to compel husbands and wives to live together.[80]

The English suit for restitution of conjugal rights does not proceed, in these times, to the point of compelling copulation, by direct or indirect means of coercion, though under the old canon law the rule may have been otherwise, but the obstinate offender is simply imprisoned for contempt.[81]

§ 1476. Judicial Divorce; Grounds; Divorce from Bed and Board and from Bonds of Matrimony.

Divorce is usually, however, in these days, a matter of judicial cognizance and sentence, as the proper investigation of such painful controversies fairly demands. The leading ground of divorce is adultery; besides which, desertion, cruelty, and kindred offences are frequently recognized as sufficient; and these kindred offences are greatly multiplied by statute in many of the United States.

Divorce by a court may be granted from bed and board (*a mensa*

77. Nicholas v. Maddox, 52 La. Ann. 1493, 27 So. 966.

78. Bucholz v. Bucholz, 1 How. Prac. (N. S.) (N. Y.) 46.

79. Reed v. Reed, 70 Neb. 779, 98 N. W. 76; Hunter v. Hunter, 88 Neb. 153, 129 N. W. 422.

80. Baugh v. Baugh, 37 Mich. 59, 26 Am. R. 495.

81. Orme v. Orme, 2 Add. Ec. 382.

et thoro), or from the bonds of matrimony (*a vinculo*); the former, which is a sort of judicial separation, being applied to the less heinous offences; while the latter, which alone is complete, is the remedy for the greater offences; or, according to the most conservative policy, for adultery only. The one is partial divorce; the other final and full divorce. Divorce from bed and board, or *a mensa et thoro,* is sometimes called a separation; and the new English divorce act (Stat. 20 & 21 Vict., c. 85, § 7) provides that instead of the former decree, the court shall pronounce for a "judicial separation," with the same force and consequences as the divorce *a mensa et thoro* formerly had.

Where the legislative grant of divorce for enumerated causes, and of divorce jurisdiction to the courts, is in terms permissive only, courts will incline to exercise a judicial discretion in accordance with the policy of the statute, and to withhold a judgment of divorce in cases not found to be within the benefits of the statute on their true merits;[82] and a husband may sue for separation as well as a wife.[83]

Divorces from bed and board and divorces from bonds of matrimony are similar as to the mode of procedure down to the pronouncing of the sentence, from which point they differ, being dissimilar in consequences.

§ 1477. Election by the Aggrieved Spouse as Between the Different Kinds of Divorce.

A spouse who is bent upon obtaining a divorce for the misconduct of the other rarely fails to petition for the fullest divorce. Yet property considerations, or possibly a lingering affection, might cause one to act otherwise; and such a discretion is sometimes permitted. Thus, in England, the new divorce act allows a party who is entitled to a divorce from the bond of matrimony to

82. Dutcher v. Dutcher, 39 Wis. 651.

83. Morris v. Morris, 177 N. Y. S. 600.

obtain, at choice, a decree for a judicial separation instead.[84] A similar right of election is permissively exercised under some American statutes.[85] In some States, again, the court itself is empowered to use discretion, by which we mean a judicial, and not an arbitrary discretion, as to making the divorce full or partial.[86] But while it is not uncommon for our local statute to permit the party once divorced from bed and board, upon his petition and for suitable cause, to obtain afterwards a divorce, upon a lapse of time specified, from bonds of matrimony, the general rule of American States where both kinds of divorce obtain is that the statute itself must determine whether, in the first instance, divorce shall be from bed and board or from bond of matrimony; while the former kind is in a sense to be regarded as preliminary to the other.

§ 1478. The Public as a Party in Divorce Suits.

Out of the interest which the State takes in supporting the marriage institution, and the rights of helpless offspring who may rise to become its responsible citizens, springs what Mr. Bishop calls "a triangular suit, *sui generis*," whenever proceedings for divorce are instituted. The divorce suit, in other words, becomes not a controversy between plaintiff and defendant alone (else divorce might be procured through their collusion, and they in effect dissolve their own marriage at pleasure); but government or the public is a third party, whose interests the court feels bound to protect. Usually, however, the divorce court is left to protect the interests of the State without professional aid, and decides in pursuance of such a trust. We are, therefore, constrained to regard modern divorce procedure as something peculiar; not criminal, in its character, even though a penal prohibition to the guilty party were a result, but a civil suit, sounding in tort, seeking to redress a private wrong, while at the same time attracting the

84. Dent v. Dent, L. R. 1 P. & M. 125; Mycock v. Mycock, L. R. 2 P. & M. 98.

85. Smith v. Smith, 3 S. & R. 248.

86. As in Tennessee, North Carolina, and California. Rutledge v. Rutledge, 5 Sneed, 554.

government or public besides the parties of record. "What the government does," says Mr. Bishop, "is, first, to protect the rights of persons not before the court, but liable to be affected by the decree or sentence; secondly, to guard the interests of the public as to its morals; and, thirdly and chiefly, to see that the status of its subjects, who are the parties of record, and sometimes their children, is properly determined or established." [87]

For government does not concern itself with divorcing those who are minded to be reconciled and live on together, to which intent the party plaintiff is always free to discontinue the suit or bar himself.[88] But it denies all private right to procure a divorce for insufficient cause or by collusion, and requires that the plaintiff's case be made out with the same burden of proof, even though the defendant should default or consent to the divorce; [89] and this, not so as to lighten the defendant's disadvantage in respect to costs, alimony, and the like, but because the public conscience must be satisfied, irrespective of the private individuals, that there was justice in the complainant's case.[90]

The State is interested as a matter of public safety in the continuation and protection of the marriage state, and therefore in all divorce suits,[91] and the court must take care that divorces

87. Chancellor Kent defines a divorce suit as a private prosecution under the control of the party aggrieved, who may avail himself of it, or bar himself by his own act. 2 Kent Com. 100.

88. 2 Kent Com. 100.

89. Palmer v. Palmer, 1 Paige, 276; Welch v. Welch, 16 Ark. 527; Robinson v. Robinson, 16 Mich. 79; Scott v. Scott, 17 Ind. 309.

90. Even an incidental agreement between the parties concerning alimony will not be sustained unless the court finds it just and equitable. Daggett v. Daggett, 5 Paige, 509.

91. Whitford v. Whitford, 100 Ark. 63, 139 S. W. 653; Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020; People v. Case, 241 Ill. 279, 89 N. E. 638; Stewart v. Stewart, 175 Ind. 412, 94 N. E. 564; Summers v. Summers, 179 Ind. 8, 100 N. E. 71; Bacon v. Bacon, 43 Ind. App. 218, 86 N. E. 1030; Yeager v. Yeager, 43 Ind. App. 313, 87 N. E. 144; Robertson v. Robertson, 178 Mo. App. 478, 163 S. W. 266; Grant v. Grant, 84 N. J. Eq. 81, 92 A. 791.

An action for divorce is not a mere controversy between the private parties, but the State is interested as an adverse party so far as to oppose the granting of a divorce unless a

are not granted by suppression of evidence or collusion of parties.[92]

No married person has a legal right to a divorce, since the marriage relation is a status fixed by law, which can only be dissolved by consent of the State, for causes deemed to make probable the better service of the interests of society thereby.[93]

§ 1479. Contracts or Other Proceedings Encouraging Divorces Illegal.

It is against public policy to encourage divorce,[94] and the maintenance of the family relation is so important from the public standpoint that no acts inducing or tending towards its dissolution are countenanced, and an attorney who advertises for divorce cases with a promise of speedy and successful termination is subject to disbarment or suspension.[95]

Where a man gave a note with a stipulation on it that it was conditioned on the payees, who were attorneys, obtaining a divorce from the maker for his wife within six months, the note is void as given for an illegal consideration, and no recovery will be allowed on it. If the object of the contract is to divorce man and wife the agreement is against public policy and void. The reason of this rule is that the law views with repugnance all contracts the purpose or direct tendency of which, as gathered from its terms, is to dissolve the marriage tie, because of its regard for virtue, the

case is made within the rules prescribed by the statute. Franklin v. Franklin, 40 Mont. 348, 106 P. 353.

Divorce jurisdiction should be administered in view of the public good, as well as private rights. Jones v. Jones, 59 Ore. 308, 117 P. 414.

92. Frey v. Frey, 61 Colo. 581, 158 P. 714; Hancock v. Hancock, 55 Fla. 680, 45 So. 1020, 15 L. R. A. (N. S.) 670; Milster v. Milster (Mo. App.), 209 S. W. 620; Wass v. Wass, 41 W. Va. 126, 23 S. E. 537.

93. Allen v. Allen (Conn.), 46 A. 242, 82 Am. St. R. 135, 49 L. R. A. 142.

94. Locke v. Locke, 153 Cal. 56, 94 P. 244; Devers v. Devers, 115 Va. 517, 79 S. E. 1048.

95. People v. Taylor, 32 Colo. 250, 75 P. 914; People v. Goodrich, 79 Ill. 148; *Re* Schnitzer (Nev.), 112 P. 848, 33 L. R. A. (N. S.) 941; Ingersoll v. Coal Creek Coal Co., 117 Tenn. 263, 98 S. W. 178, 9 L. R. A. (N. S.) 282.

good order of society, the welfare of the children as the fruit of the union, and the peculiar sanctity of the marital relation.[96]

The law will not tolerate any contract which has by its terms or obvious tendency the object of securing a divorce, and for the same reason any contract is void which provides for payment for procuring testimony where the payment is contingent on success in the divorce litigation. Such a contract is calculated to induce false charges and the production of perjured testimony, to subvert truth and justice, through fraud, trickery and chicanery at the hands of unscrupulous private detectives or other conscienceless persons, and this fact has impelled the law with wisdom to declare such contracts illegal. But there is nothing illegal in an agreement to examine into the conduct of a libellant in a divorce suit and report the facts as found with a view to defend the suit, where compensation is not conditioned on success or failure of the defence or in the production of any particular testimony, and such an agreement may be enforced by suit for compensation.[97]

§ 1480. Discontinuance of Action for Nullity May Be Refused.

In suits for annulment of the marriage or in divorce suits where the validity of the marriage is brought in question the public is interested in the status of the marriage, involving, as it may, the validity of subsequent marriages and the legitimacy of offspring, and therefore the court may in its discretion refuse to allow a petitioner to discontinue an action for nullity of a marriage.[98]

96. Pierce v. Cobb, 161 N. C. 300, 77 S. E. 350, 44 L. R. A. (N. S.) 379.

97. Hare v. McGue (Cal.), 174 P. 663, L. R. A. 1918F, 1099.

98. Ginther v. Ginther, 56 N. Y. L. J. 132.

CHAPTER III.

JURISDICTION IN GENERAL.

SECTION 1481. Jurisdiction Dependent on Statute.
1482. Venue of Action.
1483. Place of Marriage or of Offence.
1484. Consent or Failure to Plead Jurisdiction.
1485. Appearance.
1486. No Jurisdiction Through Garnishees.
1487. Co-respondent.

§ 1481. Jurisdiction Dependent on Statute.

Jurisdiction to grant divorce exists to-day only as provided by statute,[1] and the power to grant a divorce is not within the general equity jurisdiction of courts of equity,[2] but divorces are granted in equity in some States.[3]

A statute giving a court power to decree divorces gives it no power to decree a legal separation, as a separation was the decree granted by the ecclesiastical courts, and the ecclesiastical law was not adopted in this country as part of the common law.[4]

1. Smith v. Smith, 61 Colo. 71, 156 P. 148; Carlton v. Carlton, 44 Colo. 27, 96 P. 995; Masure v. Masure, 171 Ill. App. 438; Johnson v. Johnson, 75 Ky. (12 Bush) 485; Murray v. Murray (Md.), 107 A. 550; Stone v. Duffy, 219 Mass. 178, 106 N. E. 595; Judson v. Judson, 171 Mich. 185, 137 N. W. 103; Heck v. Bailey (Mich.), 169 N. W. 940; State *ex rel.* Stack v. Grimm, 239 Mo. 340, 143 S. W. 450; Aldrich v. Steen, 71 Neb. 33, 100 N. W. 311; Clemons v. Helehan, 52 Neb. 287, 72 N. W. 270 (jurisdiction of foreign court over divorce must be specifically shown); Worthington v. District Court of Second Judicial Dist. in and for Washoe County, 37 Nev. 212, 142 P. 230; Patton v. Patton, 123 N. Y. S. 329, 67 Misc. 404; Irwin v. Irwin, 2 Okla. 180, 37 P. 548; Uhl v. Irwin, 3 Okla. 388, 41 P. 376; Banigan v. Banigan, 26 R. I. 454, 59 A. 313; *In re* Christensen's Estate, 17 Utah, 412, 53 P. 1003, 70 Am. St. R. 794, 41 L. R. A. 504. See Zimmerman v. Holmes (Okla.), 159 P. 303 (Indian courts). See *post*, § 1541.

2. Martin v. Martin, 173 Ala. 106, 55 So. 632; Bodie v. Bates, 156 N. W. 8.

3. Delbridge v. Sears (Iowa), 160 N. W. 218; Sebastian v. Rose, 135 Ky. 197, 122 S. W. 120.

4. Hodges v. Hodges (N. M.), 159 P. 1007.

"While inherently the matter of granting a divorce involves the judicial process, historically and theoretically the power to grant a divorce *a vinculo* is purely legislative. Consequently there is no inherent jurisdiction in the common-law courts to grant a divorce absolutely severing and canceling the marital bonds; but they have only such power with respect to granting absolute divorces as the legislative department in the particular jurisdiction sees fit to expressly confer upon them, or such as are necessarily implied from those expressly given them." [5]

§ 1482. Venue of Action.

Venue in divorce usually depends solely on the residence of the parties.[6] Venue usually is obtained in the county where one of the parties lives,[7] but need not be for the length of time prescribed for residence in the State,[8] but where both parties live

5. Ruge v. Ruge (Wash.), 165 P. 1063, L. R. A. 1917F, 721.

6. Stewart v. Stewart (Idaho), 180 P. 165; Duke v. Duke, 72 N. J. Eq. 434, 65 A. 1117; Koch v. Koch, 79 N. J. Eq. 24, 80 A. 113 (action for desertion arises only at end of statutory period); *contra*, Duke v. Duke, 70 N. J. Eq. 135, 62 A. 466, 65 A. 1117.

7. Weyer v. Weyer (Cal. App.), 182 P. 776; Sylvester v. Sylvester, 109 Ia. 401, 80 N. W. 547; Harrison v. Harrison, 117 Md. 607, 84 A. 57 ("residence" means "domicile"); Clark v. Clark, 191 Mass. 128, 77 N. E. 702; Aldrich v. Steen, 71 Neb. 33, 100 N. W. 311; Eager v. Eager, 74 Neb. 827, 105 N. W. 636, 107 N. W. 254; McLean v. Randall (Tex. Civ. App. 1911), 135 S. W. 1116; Bachelor v. Bachelor, 30 Wash. 639, 71 P. 193; Jennings v. McDougle (W. Va.), 98 S. E. 162.

Where the husband was confined in the penitentiary in a county other than that in which he and his wife resided, the venue of a divorce suit by the wife was in the county where they resided. McLeod v. McLeod, 144 Ga. 359, 87 So. 286.

The domicile of the wife being in law that of the husband, the wife may maintain an action for divorce in the county of the husband's residence. Miller v. Miller, 141 Ky. 681, 133 S. W. 588.

A complaint alleging the plaintiff's residence in the county and that the defendant is within the county and can be served there gives jurisdiction. Merritt v. Merritt, 40 Nev. 385, 160 P. 22, 164 P. 644.

8. Gooding v. Gooding, 19 Ky. Law Rep. 967, 42 S. W. 1123; Wright v. Genesee Circuit Judge, 117 Mich. 244, 5 Det. Leg. N. 214, 75 N. W. 465.

in the State venue may be in the county where the defendant lives.[9]

General statutes authorizing change of venue of civil actions may be held to apply to divorce,[10] but a statute providing for venue in divorce actions will override a general venue statute.[11] In divorce questions of venue are not waived by failure to plead them.[12]

§ 1483. Place of Marriage or of Offence.

Usually the place of marriage[13] and of the offence are not of consequence,[14] although in some States divorce will be granted only where the cause for divorce occurred.[15]

The fact of marriage within the State is not enough to give jurisdiction of divorce,[16] and a divorce may be granted although the marriage was outside the State if sufficient domicile of the parties appears.[17]

Under some statutes domicile for the statutory period is unnecessary if the acts complained of took place in the State,[18] but where

9. Watts v. Watts, 130 Ga. 683, 61 S. E. 593.

10. Smilie v. Smilie, 24 Cal. App. 420, 141 P. 829; O'Rourke v. O'Rourke, 58 Colo. 300, 144 P. 890; People v. District Court of Second Judicial Dist., 30 Colo. 123, 69 P. 597; Powell v. Powell, 104 Ind. 18, 3 N. E. 639; Julian v. Julian, 111 N. E. 196 (no change of venue after decree); State v. District Court of Blue Earth County, 110 Minn. 501, 126 N. W. 133; Hurning v. Hurning, 80 Minn. 373, 83 N. W. 342; Cochran v. Cochran, 93 Minn. 284, 101 N. W. 179; Hockett v. Hockett, 34 S. D. 586, 149 N. W. 550.

11. Puckett v. Puckett, 174 Ala. 315, 56 So. 585.

12. Watts v. Watts, 130 Ga. 683, 61 S. E. 593; Bruner v. Bruner (Tex. Civ. App. 1898), 43 S. W. 796; Gallagher v. Gallagher (Tex. Civ. App.), 214 S. W. 516; Gibbs v. Gibbs, 26 Utah, 382, 73 P. 641. See, however, Tudor v. Tudor, 101 Ky. 530, 41 S. W. 768, 19 Ky. Law Rep. 747.

13. Swayne, J., in Cheever v. Wilson, 9 Wall. 108.

14. Franklin v. Franklin, 190 Mass. 349, 77 N. E. 48, 4 L. R. A. (N. S.) 145; Carty v. Carty (W. Va.), 73 S. E. 310, 38 L. R. A. (N. S.) 297; Cheever v. Wilson, *supra*.

15. Nicholas v. Maddox, 52 La. Ann. 1493, 27 So. 966 (abandonment); Harrington v. Harrington, 68 N. H. 360, 44 A. 522 (conviction of crime).

16. Barber v. Barber, 151 N. Y. S. 1064, 89 Misc. 519.

17. Cohen v. Cohen, 84 A. 122.

18. Dings v. Dings, 123 Ill. App. 318; Clark v. Clark, 191 Mo. App.

the acts complained of took place outside of the State domicile must be relied on.[19]

§ 1484. Consent or Failure to Plead Jurisdiction.

It is axiomatic that the consent of the parties is not enough to give jurisdiction.[20] The court must itself inquire into the jurisdictional facts of domicile,[21] and a mere failure to plead lack of jurisdiction does not give the court any basis whatever for granting a divorce. The court remarks in a recent case: "A holding that the failure of the defendant to plead in abatement . . . would bar the latter from objecting to the jurisdiction of this court, and would bar the court from any inquiry and decision upon the question of jurisdiction, would set a precedent which would open wide the door to fraud upon the jurisdiction of the courts of the State, and would make it another resort for those who are impatient of delay in throwing off and eager to be rid of their marriage ties, which would bring about the very mischiefs which our statutory requirement as to domicile in cases of suits for divorce was meant to obviate. Thus would the statute itself be rendered nugatory in this important particular." [22]

§ 1485. Appearance.

Appearance in defence will cure all imperfections as to notice, though it cannot create a jurisdiction which was already wanting, and jurisdiction will not appear from the mere fact of an appearance by the defendant where neither party is domiciled in the

278, 177 S. W. 1077; Fitzpatrick v. Fitzpatrick, 173 S. W. 444. See McConnell v. McConnell, 167 Mo. App. 680, 151 S. W. 175.

19. Labonte v. Labonte, 210 Mass. 319, 96 N. E. 675; Wacker v. Wacker, 139 N. Y. S. 78, 154 App. Div. 495.

20. Lister v. Lister, 86 N. J. Eq. 30, 97 A. 170; English v. English, 19 Pa. Super. Ct. 586.

21. Rumping v. Rumping, 36 Mont. 39, 91 P. 1057, 12 L. R. A. (N. S.) 1197.

22. Blankenship v. Blankenship (Va.), 100 S. E. 538. See Scott v. Scott, 174 Ia. 740, 156 N. W. 834 (decree valid where defendant served and did not attack jurisdictional facts improperly set up).

State,[23] but where the domicile of a plaintiff in a divorce cause is in the State where the suit was brought, and the defendant appears and defends as both parties are before the court, there is power to render a decree of divorce which will be entitled in other States to recognition under the full faith and credit clause.[24]

§ 1486. No Jurisdiction Through Garnishees.

The addition of third parties as garnishees or otherwise will not give the court jurisdiction.[25]

§ 1487. Co-respondent.

A co-respondent may appear although not a resident, and the court will thereby acquire jurisdiction of him.[26] According to a recent English decision, where a divorce was rendered in India, and the co-respondent was served only by registered mail, and a money judgment was rendered against him, this judgment is valid and can be enforced in the jurisdiction of his domicile.[27]

23. Andrews v. Andrews, 188 U. S. 14, 23 S. Ct. 237, 47 L. Ed. 366, affg. 176 Mass. 92, 57 N. E. 333; Beach v. Beach, 4 Okla. 359, 46 P. 514. See Masure v. Masure, 171 Ill. App. 438 (special appearance by defendant insufficient).

24. Cheever v. Wilson, 9 Wall. 108; Haddock v. Haddock, 201 U. S. 562, 583, 26 Sup. Ct. 525.

25. Puckett v. Puckett, 174 Ala. 315, 56 So. 585.

26. Hendrick v. Biggar, 122 N. Y. S. 162, 66 Misc. 576.

27. Phillips v. Batho (1913), 3 K. B. 25. This decision seems difficult to sustain as actions arising out of an interference with a *res*, if marriage is so regarded, are regarded as *in personam*. The decision can hardly be followed in this country.— Ed.

CHAPTER IV.

DOMICILE AS BASIS OF JURISDICTION.

SECTION 1488. Matrimonial Domicile as Basis of Jurisdiction.
1489. Domicile of Parties.
1490. Domicile at Time of Suit.
1491. Domicile of Plaintiff.
1492. Length of Domicile Required in Various States.
1493. Computation of Required Time of Residence.
1494. Constitutionality of Statute Requiring Residence for Certain Period.
1495. Whether Statute Requiring Residence for Certain Time Is Retroactive.
1496. Domicile of Defendant.

§ 1488. Matrimonial Domicile as Basis of Jurisdiction.[28]

Where the spouses are residents of different States there is a *res* in each State which may be the subject-matter of suit,[29] and the married state continues after separation within the jurisdiction of the husband authorizing the court to proceed in the absence of the wife.[30]

§ 1489. Domicile of Parties.

Residence of the parties is jurisdictional in a divorce suit,[31] and the courts of one State cannot usually fix the status of citizens of another.[32]

28. See this subject further considered *post*, 1497 *et seq.*

29. Lister v. Lister, 86 N. J. Ch. 30, 97 A. 170.

30. Sudbury v. Sudbury (Ia.), 162 N. W. 209; Stevens v. Allen, 139 La. 658, 71 So. 936; Duke v. Duke, 70 N. J. Eq. 135, affd. (Err. & App. 1907), 62 A. 1117.

31. Branch v. Branch, 30 Colo. 499, 71 P. 632; Williamson v. Williamson (Ia.), 161 N. W. 482; Blake v. Dudley, 111 La. 1096, 36 So. 203; Sampson v. Sampson, 223 Mass. 451, 112 N. E. 84 ("lives" means legal domicile); Williams v. Williams (Neb.), 163 N. W. 147 (in county where one of parties resides); Beach v. Beach, 4 Okla. 359, 46 P. 514; Zentzis v. Zentzis, 163 Wis. 342, 158 N. W. 284.

32. Watkins v. Watkins, 125 Ind. 163, 25 N. E. 175, 21 Am. St. R. 217; People v. Dawell, 25 Mich. 247, 12 Am. R. 260; Thelan v. Thelan, 75

§ 1490. Domicile at Time of Suit.

The domicile of the parties must give jurisdiction at the time of the beginning of suit,[33] without regard to where the cause of action occurred,[34] or domicile when the cause of action arose,[35] and removal before trial will not affect the jurisdiction.[36] Where an amended petition is filed jurisdiction may depend on the domicile of the plaintiff at the time of the filing of the amended petition.[37]

§ 1491. Domicile of Plaintiff.[38]

It is usually necessary to give the court jurisdiction that the plaintiff should be domiciled in the jurisdiction[39] for a certain period,[40] or where either party habitually and usually

Minn. 433, 78 N. W. 108. As to non-residents see further *post*.

33. Dormitzer v. German Savings & Loan Soc., 192 U. S. 125, 24 S. Ct. 221, 48 L. Ed. 373, affg. 23 Wash. 132, 62 P. 862; Roshniakorski v. Roshniakorski, 34 Ind. App. 128, 72 N. E. 485 (at time of amendment to petition for support asking for divorce); Shaw v. Shaw, 98 Mass. 158; Walker v. Walker, 32 R. I. 28, 78 A. 339.

34. Fraklin v. Franklin, 190 Mass. 349, 77 N. E. 48, 4 L. R. A. (N. S.) 145. See further *ante*.

35. Walker v. Walker, 111 Me. 404, 89 A. 373; Getz v. Getz, 81 N. J. Eq. 465 (action for desertion arises at end of statutory period).

36. Hill v. Hill, 87 Wash. 150, 151 P. 268.

37. Michael v. Michael, 34 Tex. Civ. App. 630.

38. See this subject further considered *post*, §§ 1492-1495.

39. Bell v. Bell, 181 U. S. (N. Y.) 175, 21 S. Ct. 551, 45 L. Ed. 804, affg. 157 N. Y. 719, 53 N. E. 1123; Vanness v. Vanness, 128 Ark. 543, 194 S. W. 498; McClintock v. McClintock, 147 Ky. 409, 144 S. W. 68 (where wife stopping with relative); Canniff v. Canniff, 49 Mich. 478, 13 N. W. 824; Thelan v. Thelan, 75 Minn. 317, 64 Am. St. R. 479; Humphrey v. Humphrey, 115 Mo. App. 361, 91 S. W. 405 (mere absence from city without change of domicile will not prevent court from acting); Ensign v. Ensign, 105 N. Y. S. 917, 54 Misc. 289, 291; *In re* Sherwood's Appeal (Pa. 1886), 4 A. 455; Halpine v. Halpine, 52 Pa. Super. Ct. 80; Gamblin v. Gamblin, 52 Tex. Civ. App. 479, 114 S. W. 408 (residence is mandatory).

A plaintiff in a cross-complaint must also have resided in the State the statutory period. Coleman v. Coleman, 23 Cal. App. 423, 138 P. 362.

40. Davis v. Davis, 132 Ala. 219, 31 So. 473; Jacobi v. Jacobi, 45 App. D. C. 442; Blandy v. Blandy, 20 App. D. C. 535; Asling v. Asling, 85 Kan. 331, 128 P. 185; Howell v. Herriff,

resides,[41] or that both must have lived together as husband and wife in the State and been domiciled in the State.[42]

The requirement of the plaintiff's residence in the State for a certain period may apply only to cases where the cause of action occurred out of the State.[43]

§ 1492. Length of Domicile Required in Various States.

Under certain circumstances one year's residence is required before filing suit for divorce in Arizona, Arkansas, California, Colorado, Georgia, Illinois, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota unless personal service is made, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, Wyoming and Nevada — thirty-three States and Porto Rico. Two years is required in Florida, Indiana, Maryland, New Jersey, North Carolina, Rhode Island, Tennessee and Vermont — eight States, and in Hawaii. Three years' residence

87 Kan. 389, 124 P. 168; Hulett v. Hulett, 30 Ky. 364, 4 Ky. Law Rep. 193; Bradfield v. Bradfield, 154 Mich. 115, 117 N. W. 588, 15 Det. Leg. N. 660 (one year's residence is mandatory); Coulter v. Coulter, 124 Mo. App. 149, 100 S. W. 1134 (next before filing the petition); Carter v. Carter, 88 Mo. App. 302; Blakeslee v. Blakeslee (Nev.), 168 P. 950; Barber v. Barber, 122 N. Y. S. 452, 137 App. Div. 665; Heath v. Heath, 44 Pa. Super. Ct. 118; Dulin v. Dulin, 33 Pa. Super. Ct. 4; McLean v. Randell (Tex. Civ. App. 1911), 135 S. W. 1116; Brashear v. Brashear (Tex. Civ. App. 1907), 99 S. W. 568; Gallagher v. Gallagher (Tex. Civ. App), 214 S. W. 516. See Adams v. Adams, 101 Md. 506, 61 A. 628. See Kern v. Field, 68 Minn. 317, 71 N. W. 393, 64 Am. St. R. 479 (decree not void because action commenced before statutory period). *Contra*, State v. Moran, 37 Nev. 404, 142 P. 534. See Bierstadt v. Bierstadt, 51 N. Y. S. 862, 29 App. Div. 210 (requirement of plaintiff's residence for a certain period applies only to non-resident defendant).

41. Keil v. Keil, 80 Neb. 496, 114 N. W. 570; Hubner v. Hubner, 67 Ore. 557, 136 P. 667.

42. Winans v. Winans, 205 Mass. 388, 91 N. E. 394; Ensign v. Ensign, 105 N. Y. S. 1114, 120 App. Div. 882; Conrad v. Conrad, 107 N. Y. S. 1093, 123 App. Div. 384; McColl v. McColl, 112 N. Y. S. 519.

43. Carter v. Carter, 113 Tenn. 509,

is required in Alabama, Connecticut, and the District of Columbia. In Massachusetts a residence of five years is required, unless the parties were inhabitants at the time of marriage and libellant has lived in the State three years. A residence of six months is required in Idaho. Louisiana has a provision in relation to marriages having been solemnized in the State. In Delaware *bona fide* residence is required, and divorces are not granted if the cause accrued in another State, and petitioner was a non-resident at the time, unless for limited causes recognized by the laws of the State. In 1895 the constitution of South Carolina was amended to provide that divorces shall not be allowed. In Texas formerly only six months' residence was required; but an amendment in 1913 provided that twelve months' residence in the State and six months in the county where suit is brought are necessary.

A residence of one year is required in Colorado unless the act was committed in the State, or one of the parties resided in the State at the time; three years in Connecticut, unless the cause arose after removal to the State; in Illinois one year, unless the offence was committed in the State; in Kentucky one year, unless the act was committed while the plaintiff was a resident of the State; in Maine one year, unless the plaintiff resided in the State when the cause accrued, or the parties were married in the State; in Michigan there must be a residence of two years if the cause arose out of the State; in Minnesota one year, except where adultery was committed in the State; in Massachusetts one year, unless both parties are domiciled in the State or service had been made on the defendant in the State; in Missouri one year, unless the act was committed in the State or while one of the parties resided in the State; and in Porto Rico one year, unless the act was committed while one of the parties resided there; in Nebraska two years' residence is required if the cause arose out of the State.[44]

82 S. W. 309 (place of cause of action as affecting jurisdiction, see *ante*, § 1483.

44. Worthington v. District Court (Nev.), 142 P. 230, L. R. A. 1916A, 696. See *post*, Vol. III.

§ 1493. Computation of Required Time of Residence.

The time required must be a residence for the required time preceding the filing of the original libel, and it is not enough to show a residence for that period immediately preceding the filing of an amended libel,[45] and residence of the parties within the State for one year means continuing until the time of separation.[46]

Where one files a complaint for divorce before he has been in the State the required period, and later files a cross-petition after the lapse of the required time, the court has jurisdiction of the cross-petition.[47]

§ 1494. Constitutionality of Statute Requiring Residence for Certain Period.

A statute requiring that the plaintiff be domiciled in the State for a certain period before the bringing of suit for divorce is constitutional.[48] So an act requiring one year's residence in the State to give the court jurisdiction of a divorce petition is not void as in violation of the Federal Constitution requiring States to give citizens of each State equal privileges and immunities and the equal protection of the laws. Such a requirement is merely a classification of a character that is common in this country. It applies the same in all parts of the State and the same to all persons under similar circumstances.[49]

An act entitled "An Act to Amend an Act Entitled 'An Act Relating to Marriage and Divorce'" contains a title sufficiently broad to cover an amendment creating a requirement of one year's residence in certain cases where both parties were not residents of

45. Hunt v. Hunt (Tex. Civ. App.), 196 S. W. 967.

46. Elwell v. Elwell, 128 N. Y. S. 495, 70 Misc. 61.

47. Kane v. Kane, 35 Wash. 517, 77 P. 842.

48. Pugh v. Pugh, 25 S. D. 7, 124 N. W. 959.

49. Worthington v. District Court (Nev.), 142 P. 230, L. R. A. 1916A, 696.

the State in order to give the court jurisdiction of a divorce action.[50]

§ 1495. Whether Statute Requiring Residence for Certain Time Is Retroactive.

An amendment lengthening the time of residence for jurisdiction for divorce applies to a case where the cause of divorce existed before the passage of the amendment. If it is a matter of practice it is clearly valid, and if it is a matter of substance it is not inimical to provisions prohibiting laws impairing the obligation of contracts, as marriage is not a contract but a statute.[51]

§ 1496. Domicile of Defendant.

Where the parties have separated action may be brought in the domicile of the defendant,[52] but where the statute requires residence for a certain period by the plaintiff the fact that the defendant resides in the jurisdiction where action is brought is not enough.[53]

50. Worthington v. District Court (Nev.), 142 P. 230, L. R. A. 1916A, 696.

51. Worthington v. District Court (Nev.), 142 P. 230, L. R. A. 1916A, 696.

52. Puckett v. Puckett, 174 Ala. 315, 56 So. 585; Peterson v. Peterson, 156 Ky. 202, 160 S. W. 952; Green v. Green, 28 Mass. (11 Pick.) 410; Sewall v. Sewall, 122 Mass. 156, 23 Am. R. 299; Pine v. Pine, 72 Neb. 463, 100 N. W. 938; Tiedemann v. Tiedemann, 36 Nev. 494, 137 P. 824; Berger v. Berger (N. J. Ch.), 105 A. 496 (although desertion relied on occurred in another State); Osiel v. Osiel (N. J. Ch. 1906), 63 A. 549; Abele v. Abele, 62 N. J. Eq. 644, 50 A. 686; Ames v. Ames, 7 Pa. Super. Ct. 456, 21 Pa. Co. Ct. R. 257, 4 Lack. Leg. N. 199.

53. Shatney v. Shatney, 76 N. H. 391, 83 A. 124.

CHAPTER V.

WHAT CONSTITUTES DOMICILE IN DIVORCE.

SECTION 1497. Domicile in General.
1498. Residence Equivalent to Domicile.
1499. Permanent and Temporary Location.
1500. Temporary Absence.
1501. Change of Domicile.
1502. Domicile Not in Good Faith.
1503. Constitutionality of Statute Avoiding Divorce by Citizen in Another State in Fraud of Law of Domicile.
1504. Domicile of Soldier.
1505. Acquiring Domicile in Orient.
1506. Wife's Separate Domicile When Wife Is Libellant.
1507. Wife's Separate Domicile Where Wife Is Libellee.
1508. Effect on Husband of Divorce at Wife's Separate Domicile.
1509. Estoppel to Deny Domicile.
1510. Proof of Domicile.

§ 1497. Domicile in General.

Every person must in law be domiciled somewhere because every person owes some duties to society and has some obligations to perform to the government which affords him protection, which duties cannot be laid aside at will. Domicile is imposed on one at birth, and though a man may, on arriving at legal age, choose the place where it shall be, it is not at his option whether he shall be without any. With regard to residence or home it is entirely different. This is a matter of privilege exclusively.[54]

The domicile of a man will usually be in the place where he votes.[55] A citizen of the State may be one foreign born who had duly declared his intention to become a citizen.[56]

54. Warren v. Warren (Fla.), 75 So. 490, L. R. A. 1917E, 490.

55. Downs v. Downs, 23 App. D. C. 381; Hammond v. Hammond, 93 N. Y. S. 1, 103 App. Div. 437.

56. Cairns v. Cairns, 29 Colo. 260, 68 P. 233, 93 Am. St. R. 55.

§ 1498. Residence Equivalent to Domicile.

The requirement of residence is equivalent to "domicile,"[57] and "residence" means legal residence or domicile.[58]

§ 1499. Permanent and Temporary Location.

Residence does not appear without some permanent location,[59] and is not satisfied by a mere temporary stopping in the jurisdiction.[60] So a libellant cannot claim to be a resident of the State when she has not lived in the State for over twelve years, and was married to the libellee in another country.[61]

And where a man breaks up housekeeping on account of the adultery of his wife and lives in different places, where he works and retains no fixed place of abode in the town where he and his wife formerly lived, and has merely a general intention of returning there, the court of this town has no jurisdiction to entertain his application for divorce as he has no domicile there.[62]

§ 1500. Temporary Absence.

Residence in a State need not be continuous,[63] and on the other

57. Terrill v. Terrill, 2 Alaska, 475; Sneed v. Sneed, 14 Ariz. 17, 123 P. 312; Cohen v. Cohen (Del.), 84 A. 122; Bechtel v. Bechtel, 101 Minn. 511, 112 N. W. 883; Fleming v. Fleming, 36 Nev. 135, 134 P. 445; Barber v. Barber, 151 N. Y. S. 1064, 89 Misc. 519; Connolly v. Connolly, 33 S. D. 346, 146 N. W. 581; Miller v. Miller, 88 Vt. 134, 92 A. 9.

58. Downs v. Downs, 23 App. D. C. 381; Hamill v. Talbott, 81 Mo. App. 210; Graham v. Graham, 9 N. D. 88, 81 N. W. 44; Smith v. Smith, 7 N. D. 404, 75 N. W. 783; Michael v. Michael, 34 Tex. Civ App. 630, 79 S. W. 74.

59. Van Alstine v. Van Alstine, 23 Wash. 310, 63 P. 243.

60. Mauser v. Mauser, 59 Pa. Super. Ct. 275; Reed v. Reed, 59 Pa. Super. Ct. 178.

61. Warren v. Warren (Fla.), 75 So. 35, L. R. A. 1917E, 490.

62. Turner v. Turner (Vt.), 88 A. 3, 47 L. R. A. (N. S.) 505.

63. De Tolna v. De Tolna, 135 Cal. 575, 67 P. 1045 (living on yacht); Morehouse v. Morehouse, 70 Conn. 420, 39 A. 516 (spending winters out of State); Boreing v. Boreing, 24 Ky. Law Rep. 1288, 71 S. W. 431 (teaching in other States); Shirk v. Shirk, 75 Mo. App. 573 (where man has two residences he may be domiciled in place he selects); Moore v. Moore, 130 N. C. 333, 41 S. E. 943; Mason v. Mason, 69 N. J. Eq. 292, 60 A. 337 (holding residence to be in New York

hand a temporary absence will not affect the right to maintain the action.[64]

§ 1501. Change of Domicile.

Leaving the State, expecting to live permanently elsewhere, entails a loss of residence.[65]

§ 1502. Domicile Not in Good Faith.

Residence in a State for the statutory period solely for the purpose of obtaining a divorce is not sufficient to give the court jurisdiction, but a *bona fide* residence with the intention of remaining must appear,[66] but the mere fact that the main purpose of one in

where the mother of female plaintiff lived and where she worked although she had a room in New Jersey); Pohlman v. Pohlman, 60 N. J. Eq. 28, 46 A. 658 (carrying on business in New York); Doerne v. Doerne, 89 N. Y. S. 215, 96 App. Div. 284 (opera singer). See Sparks v. Sparks, 114 Tenn. 666, 88 S. W. 173 (government employee in Washington for 25 years loses his domicile in his native State of Tennessee).

64. Smith v. Davis, 170 Ky. 379, 186 S. W. 176; Bradfield v. Bradfield, 154 Mich. 115, 117 N. W. 588, 15 Det. Leg. N. 660 (visiting relatives); Stone v. Stone, 134 Mo. App. 242, 113 S. W. 1157 (traveling salesman); Miller v. Miller (Neb.), 131 N. W. 203, 34 L. R. A. (N. S.) 360 (railway mail clerk); Butler v. Butler, 134 N. Y. S. 108; Fox v. Fox (Tex. Civ. App.), 179 S. W. 883; Dickinson v. Dickinson (Tex. Civ. App. 1911), 138 S. W. 205; Duxstad v. Duxstad, 17 Wyo. 411, 100 P. 112.

65. Hoffman v. Hoffman, 155 Mich. 328, 118 N. W. 990, 15 Det. Leg. N. 1031; Blondin v. Brooks, 83 Vt. 472, 76 A. 184 (animus to change necessary).

Intention not enough. In determining whether complainant in a suit for divorce was a resident of the State, her intention without acts to support it is not controlling. Bradfield v. Bradfield, 154 Mich. 115, 117 N. W. 588, 15 Det. Leg. N. 660.

66. Beeman v. Kitzman, 124 Ia. 86, 99 N. W. 171; Andrews v. Andrews, 176 Mass. 92, 57 N. E. 333, 188 U. S. 14, 23 S. Ct. 237, 47 L. Ed. 366; Colburn v. Colburn, 70 Mich. 647, 38 N. W. 607; Presson v. Presson, 38 Nev. 203, 147 P. 1081; Smith v. Smith, 10 N. D. 219, 86 N. W. 721; Graham v. Graham, 9 N. D. 88, 81 N. W. 45; Smith v. Smith, 7 N. D. 404, 75 N. W. 783; Hooker v. Hooker (N. J. Ch.), 37 A. 773 Grover v. Grover, 63 N. J. Eq. 771, 50 A. 1051; Williams v. Williams, 78 N. J. Eq. 13, 78 A. 693; Sweeney v. Sweeney, 62 N. J. Eq. 357, 50 A. 785; Wallace v. Wallace, 62 N. J. Eq. 509 (1903), 65 N. J. Eq. 359, 50 A. 788, 54 A. 433; Tracy v. Tracy, 60 N. J. Eq. 25, reversed (1901) 62 N. J. Eq. 807, 46 A.

going to another State is to obtain a divorce will not prevent a divorce there if it is his purpose to remain there permanently,[67] and it is not enough to remain in the new domicile a few weeks or months at a time and spend practically the entire time at the old domicile.[68]

§ 1503. Constitutionality of Statute Avoiding Divorce by Citizen in Another State in Fraud of Law of Domicile.

Mere residence in a State as distinguished from domicile is not sufficient to confer jurisdiction upon a court of such State to dissolve the marriage relation existing between the plaintiff and a non-resident defendant. So a statute is valid which provides that a divorce is void when obtained by a citizen of the State who goes into another State to procure a divorce in fraud of the law of the domicile.[69]

§ 1504. Domicile of Soldier.

The mere fact that a soldier is stationed in a certain place for the required period does not make it his residence to give jurisdiction in divorce.[70] So where a resident of Louisiana is appointed to West Point and after graduation there serves in the United States army for thirty years, he retains his domicile in Louisiana although he does not actually live there, and he may there bring suit for divorce for desertion, although he was married in another State and had never lived in Louisiana with his wife. When she

657, 48 A. 533; McGean v. McGean, 60 N. J. Eq. 21, affd. (1901) 46 A. 656, 49 A. 1083, 63 N. J. Eq. 285; Streitwolf v. Streitwolf, 58 N. J. Eq. 563, 41 A. 876, affd. 181 U. S. 179, 78 Am. St. R. 630, 43 A. 683, 21 S. Ct. 553, 45 L. Ed. 807; Beach v. Beach, 4 Okla. 359, 46 P. 514; Reed v. Reed, 30 Pa. Super. Ct. 229.

67. Andrade v. Andrade, 14 Ariz. 379, 128 P. 813; Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 A. 684; Dunham v. Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70. See *In re* Hall, 70 N. Y. S. 406, 61 App. Div. 266.

68. State v. Herren, 175 N. C. 754, 94 S. E. 698.

69. Andrews v. Andrews, 188 U. S. 14.

70. Gallagher v. Gallagher (Tex. Civ. App.), 214 S. W. 516.

married him she took on his marital domicile, which was Louisiana, and the courts of this State are the only courts which have a right to dissolve the marital status even though this must be done by constructive service.[71]

§ 1505. Acquiring Domicile in Orient.

The English House of Lords has very recently brought its rule into line with American decisions,[72] holding that an Englishman can establish a domicile in a country granting extraterritorial rights to foreigners.[73] The earlier rule was that the laws and customs of Eastern countries were so different that it could not be presumed that an Englishman intended to adopt that domicile by living there. So where a British subject made his permanent home in Egypt, where he enjoyed extraterritorial rights, a petition by his wife in England for a divorce was denied for lack of jurisdiction, as the husband had acquired a legal domicile in Egypt.[74]

§ 1506. Wife's Separate Domicile When Wife Is Libellant.

The domicile of the wife for the purposes of divorce is not necessarily that of the husband, but it is sufficient if she is a *bona fide* resident of the State where suit is brought,[75] especially where she remains in the place where they last had their domicile,[76] but

71. Stevens v. Allen (La.), 71 So. 936, L. R. A. 1916E, 1115.

72. Mather v. Cunningham, 106 Maine, 115, 75 A. 323.

73. Casdagli v. Casdagli (1919 H. L.), 120 L. T. R. 52. See learned article in 28 Yale Law Journal, 810.

74. Casdagli v. Casdagli (1919 H. L.), 120 L. T. R. 52.

75. Hill v. Hill, 166 Ill. 54, 46 N. E. 751; Johnson v. Johnson, 57 Kan. 343, 46 P. 700; Dunn v. Dunn, 59 Kan. 773, 52 P. 69; Auxier v. Auxier, 155 Ky. 174, 159 S. W. 678, modifying judgment on rehearing, 151 Ky. 504, 152 S. W. 573; Harteau v. Harteau, 31 Mass. (14 Pick.) 181, 25 Am. Dec. 372; Sworoski v. Sworoski, 75 N. H. 1, 70 A. 119; *contra*, McGown v. McGown, 164 N. Y. 558, 43 N. Y. S. 745, 58 N. E. 1089, (1897) Id., 46 N. Y. S. 285, 19 App. Div. 368, judgment affirming (1900) 18 Misc. 708.

76. Burtis v. Burtis, 161 Mass. 508, 37 N. E. 740; Ensign v. Ensign, 105 N. Y. S. 917, 54 Misc. 289, 291.

only when she separates from her husband for justifiable cause does she acquire a separate domicile.[77]

Thus a deserted wife may leave the State of her husband and acquire a new domicile in the State where she settled with the intention of making a permanent abode.[78] Where a wife separates from her husband and goes to live with a relative with the intention of making it her home, she may in that county apply for a divorce, and this is her domicile for the purposes of jurisdiction. The act and intention of making this her home decide the matter.[79] Where parties were married in the State and move into another State, where the husband deserts the wife and the wife then returns to the State which is the original State of her domicile, she

77. Sneed v. Sneed, 14 Ariz. 17, 123 P. 312; Pearlstine v. Pearlstine (Ga.), 98 S. E. 264; Petty v. Petty, 42 Ind. App. 443, 85 N. E. 995; Hall v. Hall, 102 Ky. 297, 43 S. W. 429, 19 Ky. Law Rep. 1312; George v. George (La.), 79 So. 832; Kendrick v. Kendrick, 188 Mass. 550, 75 N. E. 151; Gebhard v. Gebhard, 54 N. Y. S. 406, 25 Misc. 1; *In re* Colebrook, 55 N. Y. S. 861, 26 Misc. 139; Ransom v. Ransom, 104 N. Y. S. 198, 54 Misc. 410; Ensign v. Ensign, 105 N. Y. S. 1114, 120 App. Div. 882; Ransom v. Ransom, 109 N. Y. S. 1143, 125 App. Div. 915; Kaufman v. Kaufman, 163 N. Y. S. 566, 177 App. Div. 162, 160 N. Y. S. 19; Miller v. Miller, 67 Ore. 359, 136 P. 15; Barning v. Barning, 46 Pa. Super. Ct. 291; Michael v. Michael, 34 Tex. Civ. App. 630; Patch v. Patch, 86 Vt. 225, 84 A. 815; Ditson v. Ditson, 4 R. I. 87.

In Cheever v. Wilson, 9 Wall. 108, Swayne, J., says: "The rule is that she [*i. e.* the wife] may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity of its exercise and endures as long as the necessity continues. The proceedings for a divorce may be instituted where the wife has her domicile."

78. Lamont v. Lamont, 134 Ga. 523, 68 S. E. 96 (after twelve months); Brown v. Brown, 164 Ill. App. 589; Holmes v. Holmes (Ia.), 170 N. W. 793; Cummings v. Cummings, 133 Ky. 1, 117 S. W. 289; Bechtel v. Bechtel, 101 Minn. 511, 112 N. W. 883; Hibbert v. Hibbert, 72 N. J. Eq. 778, 65 A. 1028; Tracy v. Tracy, 62 N. J. Eq. 807, 48 A. 533; King v. King, 74 N. J. Eq. 824, 71 A. 687 (residence in State at different places with intention of permanently living in State is enough); Kaufman v. Kaufman, 160 N. Y. S. 19; Shepard v. Shepard, 18 Pa. Super. Ct. 467; Steckel v. Steckel, 86 S. E. 833; Carty v. Carty (W. Va.), 73 S. E. 310, 38 L. R. A. (N. S.) 297; Buckley v. Buckley, 50 Wash. 213, 96 P. 1079.

79. McLintock v. McClintock, 147 Ky. 409, 144 S. W. 68, 39 L. R. A. (N. S.) 1127.

can here obtain a divorce for desertion. The wife having become a citizen of the State in good faith, she is entitled to the protection of its laws. The fact that the desertion takes place in another State is immaterial where the divorce statutes make no difference as to the place of the arising of the ground for which a divorce may be granted, but jurisdiction depends on the domicile of the parties.[80]

The deserted wife may, however, bring suit in the State of the matrimonial domicile where she remains,[81] as her domicile does not follow his in this case.[82] So where the statute requires a year's residence in the State by the libellant before divorce proceedings can be brought, this is satisfied where the libellant leaves the State on account of her husband's ill treatment and goes to another State with the intention of remaining there until her husband sends for her, and where, after some years, she returns and files a libel for divorce in the State of his domicile. She did not, by living in the other State, lose her domicile in the State she left, as she did not go to the other State with the intention of remaining there and making it her permanent abode. Having in mind the evil the statute was intended to guard against, the court does not think the word " reside " should be construed to mean that the libellant must actually live in the State during the year preceding the libel, but it is sufficient if her legal domicile is here.[83]

§ 1507. Wife's Separate Domicile Where Wife Is Libellee.

It is difficult to see, however, how the husband can bring suit at the separate residence of his wife, as she can acquire such separate residence only in case he is at fault and she leaves him for good

80. Carty v. Carty (W. Va.), 73 S. E. 310, 38 L. R. A. (N. S.) 297.

81. Ackerman v. Ackerman, 200 N. Y. 72, 93 N. E. 192, affirming judgment (1908) 108 N. Y. S. 534, 123 App. Div. 750; Woolworth v. Woolworth, 100 N. Y. S. 865, 115 App. Div. 405; Johnson v. Johnson (Tex. Civ. App. 1908), 107 S. W. 578; State v. Morse, 31 Utah, 213, 87 P. 705, 7 L. R. A. (N. S.) 1127.

82. Perkins v. Perkins, 225 Mass. 82, 113 N. E. 841.

83. Miller v. Miller (Vt.), 92 A. 9, L. R. A. 1915D, 852.

cause, and such suit has been recently dismissed for lack of jurisdiction.[84]

§ 1508. Effect on Husband of Divorce at Wife's Separate Domicile.

One result of the rule requiring personal service to validate a foreign divorce is that where a deserted wife goes to another State, where she establishes a separate domicile under the law of that State, and there obtains a divorce without personal service on the husband, and later marries again and returns to the State where she formerly lives, the second husband may be sued for criminal conversion by the first husband.[85]

§ 1509. Estoppel to Deny Domicile.

A defendant in a proceeding for alimony who has not resided in the State for over ten years may nevertheless be estopped to deny that he is a resident there by recitals in his libel for divorce against the present libellant, as it is a suit between the same parties involving the same subject-matter.[86]

§ 1510. Proof of Domicile.

The residence of the libellee may be proved at any time during the proceedings.[87]

84. Aspinwall v. Aspinwall (Nev.), 160 P. 253.

85. Berney v. Adriance, 142 N. Y. Suppl. 748. As to foreign divorces see *post*, § 1953 *et seq.*

86. Warren v. Warren (Fla.), 75 So. 35, L. R. A. 1917E, 490.

87. Guild v. Guild, 16 Vt. 512.

CHAPTER VI.

PARTIES.

SECTION 1511. Spouse Must Be Libellant.
1512. Parties Defendant.
1513. Aliens.
1514. Infants or Spendthrifts.
1515. Insane Persons.
1516. Married Women.
1517. Disqualification of Judge as Related to Party.
1518. Rights of Co-respondent.
1519. Intervention of Public Attorney.

§ 1511. Spouse Must Be Libellant.

Public policy insists so strenuously upon upholding the marriage relation against all outside of it who may seek to intermeddle, that the only proper libellant is that aggrieved spouse who deliberately chooses to take the responsibility of a matrimonial issue. The libellant ought therefore to sign his libel, as evidence that the momentous responsibility is thus assumed; and in some States such personal signature is expressly required by statute.[88] Even in case of absence or nonage, rendering, perhaps, the intervention of some third person in the pleadings desirable, courts act with the closest scrutiny into the wishes of the real libellant, and do not permit that of any third person to be substituted.[89]

On the other hand, ecclesiastical practice has been, where sentence of nullity was sought, to allow any person plainly interested, especially the father of either of the parties, to attack the supposed marriage, and establish its invalidity.

88. Philbrick v. Philbrick, 27 Vt. 786; Daniels v. Daniels, 56 N. H. 219. The subscription of an attorney will not suffice, even though that attorney be empowered by letters. Gould v. Gould, 1 Met. 382.

89. See Morgan v. Morgan, 2 Curt. Ec. 679; Newcomb v. Newcomb, 13 Bush, 544.

§ 1512. Parties Defendant.

Persons conspiring with defendant to do the acts complained of are not necessary or proper parties to a suit for divorce,[90] but in a petition for divorce and partition of certain property one who holds liens on the property should be made a party,[91] and the mere suggestion that the defendant might dispose of his property is no reason for adding third persons as parties defendant.[92]

§ 1513. Aliens.

An alien living in a State the required period may sue for divorce as being a resident and a citizen.[93]

§ 1514. Infants or Spendthrifts.

It is the theory of all civil actions that one who, like an infant, cannot enter into a contract will not be permitted to sue upon it. But as infants can enter into a marriage contract it seems settled that they can sue for their dissolution in divorce, and also that they can defend an action for divorce against them. So where one infant brings a libel for divorce against another the libellant should not sue by *prochein ami,* and the libellee need not defend by guardian *ad litem;*[94] so the right to petition is held personal also as to an infant spouse,[95] or to one under guardianship as a spendthrift.[96]

90. Musselmann v. Musselman, 44 Ind. 106 (conspiracy to have plaintiff adjudged insane); Peck v. Peck, 66 Mich. 286, 33 N. W. 893 (unless third person has conspired to defraud plaintiff); Bennett v. Bennett, 15 Okla. 286, 81 P. 632, 70 L. R. A. 864 (grantee of fraudulent conveyance). See Peck v. Uhl, 66 Mich. 592, 33 N. W. 893.

91. Woeltz v. Woeltz, 94 Tex. 148, 57 S. W. 905, 86 Am. St. R. 829.

92. Puckett v. Puckett, 174 Ala. 315, 56 So. 585.

93. Sedgwick v. Sedgwick, 50 Colo. 164, 114 P. 488.

94. Bentley v. Bentley (Ga. 1920), 102 S. E. 21.

95. Besore v. Besore, 49 Ga. 378.

96. Richardson v. Richardson, 50 Vt. 119.

§ 1515. Insane Persons.[97]

An insane spouse may, by guardian or committee, bring a divorce suit for cause against the guilty partner, with the same rights as though such complainant were in his or her right mind.[98]

Where the defendant has been adjudged insane and a guardian appointed for him, action for divorce should be brought against him and his guardian, although he was of sound mind when the action was brought.[99] So where a divorce is granted without service on an insane libellee the decree is void, and the court should entertain a petition by the next of kin of the insane person for the appointment of a guardian *ad litem* with authority to maintain action to set aside the decree.[1]

§ 1516. Married Women.

The ancient incapacity of married women being after all a legal fiction, local practice generally permits or requires a wife to sign her own libel. A married woman should be impleaded by her own baptismal or Christian name, and not by the initial letters of her husband's name.[2]

97. Insanity as defence to divorce libel, see *post*, § 1679.

98. Baker v. Baker, L. R. 6 P. D. 12. The husband is not the proper person to be substituted as his wife's guardian in such a case. Fegan's Estate, Myrick (Cal.), 10.

See Worthy v. Worthy, 36 Ga. 45; Bradford v. Abend, 89 Ill. 78. Mordaunt v. Mordaunt, L. R. 2 P. & D. 103, 109, 382, shows English practice averse to permitting a divorce suit to go on whether libellant or libellee be insane. But American cases appear to concede the first part of such a proposition without the second. Broadstreet v. Broadstreet, 7 Mass. 474; Rathbun v. Rathbun, 40 How. (N. Y.) Pr. 328. As to partial divorce, or judicial separation, an insane person may be less readily held incapable of appearing through others as plaintiff or defendant. As to proceedings for nullity, insanity, so far from rendering the suit improper, may furnish the best reason for entertaining it. Hancock v. Peaty, L. R. 1 P. & D. 335.

99. Huston v. Huston's Committee, 150 Ky. 353, 150 S. W. 386.

1. State v. District Court, 38 Mont. 166, 99 P. 291, 35 L. R. A. (N. S.) 1098.

2. Ratcliffe v. McDonald (Va.), 97 S. E. 307.

§ 1517. Disqualification of Judge as Related to Party.

Under a statute disqualifying a judge from sitting in a case if related to one of the "parties," a judge is disqualified who is the father of one of the attorneys who is asking for counsel fees in a divorce suit. The weight of authority favors the adoption of a broad and liberal interpretation of the term "parties." [3]

§ 1518. Rights of Co-respondent.

Statutes often provide that a co-respondent named has a right to intervene and have the issues tried as to him,[4] but the co-respondent has no such right in the absence of statute.[5]

At common law, in an action of divorce for adultery, only the spouse need be made a party defendant, but by statute in some jurisdictions the co-respondent should be made a party where known. Under such a statute the fact that the paramour of the wife registered under a fictitious name does not require him to be made a party where his identity cannot be established, and he cannot be reached by service or publication, as no purpose would be served by making him a party.[6]

The court should, where necessary, take proper steps to protect the reputation of the co-respondent where it is unjustly assailed, even after the evidence is closed. So where after a hearing the court announces the guilt of the co-respondent on conflicting evidence, and the libellee then moves before decree to reopen the case on the ground that the co-respondent has been examined by reputable physicians and found to be a virgin, the case should be reopened and the evidence heard. The court remarks that her reputation and whole future life is at stake, and that the stigma placed

3. Brown v. Brown, 103 Kan. 53, 172 Pac. 1005, L. R. A. 1918F, 1033.

4. Rixa v. Rixa, 71 N. Y. S. 815, 10 N. Y. Ann. Cas. 119 (statute applies to cross-libel for adultery); Stafford v. Stafford, 156 N. Y. S. 459, 92 Misc. 563; Shaw v. Shaw, 140 N. Y. S. 388, order affirmed 141 N. Y. S. 425, 156 App. Div. 379.

5. Howell v. Herriff, 87 Kan. 389, 124 P. 168.

6. McLarren v. McLarren, 45 App. D. C. 237, 1 A. L. R. 1412.

upon her can be removed by hearing the evidence, and that the court is under a duty in equity to do so.[7]

§ 1519. Intervention of Public Attorney.

In a few of our States the public prosecuting officer is required to oppose suits for divorce; and in Scotland it was long the practice for government counsel to guard the public as against the private parties.[8]

The statutes sometimes provide for the intervention of the public attorney to defend divorce cases,[9] whose duty it is to state any defence which can be properly made,[10] but the failure of the prosecuting officer to appear is a mere irregularity which does not affect the jurisdiction.[11]

7. Cole v. Cole, 48 Washington Law Reporter, 234.

8. Green v. Green, 7 Ind. 113.

9. State v. Friedley, 151 Ind. 404, 51 N. E. 473 (a prosecuting attorney discharged from further service cannot move for a new trial); Yeager v. Yeager, 43 Ind. App. 313, 87 N. E. 144; Smythe v. Smythe, 80 Ore. 150, 156 P. 785.

10. Smythe v. Smythe, 80 Ore. 150, 156 P. 785.

11. Cole v. Cole (Mich.), 160 N. W. 418.

CHAPTER VII.

PROCESS AND SERVICE.

SECTION 1520. Service.
1521. Service Outside Jurisdiction.
1522. Substituted Service.
1523. Affidavit as Basis of Substituted Service.
1524. Injunction Against Interference with Spouse.

§ 1520. Service.

Divorce suits are commonly governed by special statutes as to service rather than by statutes covering civil suits,[12] but in the absence of special statute divorce suits will be governed by laws as to civil actions.[13]

Summons may issue to any county in the State,[14] and may require special inquiry as to identification.[15]

Where the petition does not show jurisdiction, and no appearance is entered, if the petition is amended new process must be taken out.[16]

Service of summons is jurisdictional and cannot be waived by appearance,[17] and acceptance of service is bad practice.[18]

12. Raymond v. Williston, 213 F. 525; Morris v. Morris, 83 A. 934; Eastes v. Eastes, 79 Ind. 363; Thompson v. Emery, 127 La. 718, 53 So. 968; *The shifting of residence* to avoid or delay the service of process in a divorce suit is not favored in law. Harrison v. Harrison, 117 Md. 607, 84 A. 57; (Err. & App.) Henry v. Henry, 81 N. J. Eq. 512, 86 A. 1102, affirming order (Ch.) 79 N. J. Eq. 493, 82 A. 47; Henry v. Henry, 79 N. J. Eq. 493, 82 A. 47; Stuart v. Cole (Tex. Civ. App. 1906), 92 S. W. 1040.

13. Newcomb's Ex'rs v. Newcomb, 76 Ky. (13 Bush) 544, 26 Am. R. 222; Cole v. Cole, 113 Me. 358, 94 A. 120 (nominal attachment in writ of attachment enough). See Braham v. Braham, 154 N. Y. S. 1044, 91 Misc. 151.

14. Eager v. Eager, 74 Neb. 827, 105 N. W. 636, 107 N. W. 254.

15. Challender v. Challender, 65 N. J. Eq. 9, 59 A. 643.

16. Blauvelt v. Blauvelt, 68 N. J. Eq. 59, 59 A. 567.

17. Wood v. Wood, 74 A. 376.

18. Palmer v. Palmer (Del. Super. 1903), 4 Pennewill, 402, 57 A. 533.

The defendant may be entitled to a divorce on a cross-bill without personal service on the plaintiff.[19]

The co-respondent need be served only where he is identified and can be located.[20] Service should appear by a return of the sheriff,[21] or by affidavit,[22] and it is enough to show that the notice is mailed without showing its receipt.[23] Service of the notice after the return day is insufficient.[24]

§ 1521. Service Outside Jurisdiction.

Personal service on the defendant outside the State on a writ brought properly within the State is sufficient,[25] but where the statute calls for a notice, the service of a writ outside the State is insufficient.[26]

A statute giving the plaintiff a right to bring suit in a county other than that of the defendant's residence necessarily gives a right to direct process to the sheriff of another county.[27]

§ 1522. Substituted Service.[27a]

Where personal service cannot be had provision is usually made for substituted service by leaving the process at the residence of

19. Von Bernuth v. Von Bernuth, 76 N. J. Eq. 487, 74 A. 700.

20. McLarren v. McLarren, 45 App. D. C. 237.

21. Cavanaugh v. Smith, 84 Ind. 380 (false return not conclusive); McElrath v. McElrath, 120 Minn. 380, 139 N. W. 708. See Bunderman v. Bunderman, 117 Minn. 366, 135 N. W. 998 (service out of State). See Swearingen v. Swearingen (Tex. Civ. App.), 193 S. W. 442 (return good signed by sheriff although deputy actually made service).

22. Paddock v. Paddock (Mo. App. 1906), 91 S. W. 398; Fawcett v. Fawcett, 61 N. Y. S. 108, 29 Misc. 673 (affidavit of plaintiff's brother is insufficient); Stuart v. Cole (Tex. Civ. App. 1906), 92 S. W. 1040; *In re* Geith's Estate, 129 Wis. 498, 109 N. W. 552 (although affidavit of service not filed till after judgment).

23. Hazard v. Hazard, 205 Ill. App. 562.

24. Sparkman v. Sparkman (Tex. Civ. App.), 209 S. W. 252.

25. Williams v. Williams (Neb.), 163 N. W. 147; Fitzpatrick v. Fitzpatrick, 173 S. W. 444.

26. Givens v. Givens (Tex. Civ. App.), 195 S. W. 877.

27. Jennings v. McDougle (W. Va.), 78 S. E. 162.

27a. As to validity of divorce obtained by substituted service against non-resident, see *post*, § 1964.

the defendant,[28] and it should sometimes be posted,[29] or by mailing,[30] or through the appointment of a guardian *ad litem*.[31]

§ 1523. Affidavit as Basis of Substituted Service.

Service by publication may be authorized, based on an affidavit of non-residence, which affidavit must conform to the statute,[32] properly naming the defendant[33] and the ground of the

28. Newcomb's Ex'rs v. Newcomb, 76 Ky. (13 Bush) 544, 26 Am. R. 222 (wife confined by husband in asylum in another State is not a non-resident authorizing constructive service); North v. North, 93 N. Y. S. 512, 47 Misc. 180; Maiello v. Maiello, 86 N. Y. S. 543, 42 Misc. 266 (only where service by publication cannot be made); *contra*, Connella v. Connella, 114 La. 950, 38 So. 690. See Railey v. Railey, 23 Ky. Law Rep. 1891, 66 S. W. 414.

A void process served on the defendant in a divorce proceeding cannot be held a valid constructive or substituted service. Masure v. Masure, 171 Ill. App. 438.

29. Wheeler v. Britton, 137 La. 975, 69 So. 766.

30. Miller v. Miller, 37 Nev. 257, 142 P. 218.

31. Wheeler v. Britton, 134 La. 63, 63 So. 624; Elmore v. Johnson, 121 La. 277, 46 So. 310; Whitney v. Finnegan, 129 La. 572, 56 So. 512.

32. Parker v. Parker, 222 F. 186, 137 C. C. A. 626; Taylor v. Taylor, 65 Fla. 521, 60 So. 116; Bonsell v. Bonsell, 41 Ind. 476 (information and belief sufficient); Lewis v. Lewis, 138 Ia. 593, 116 N. W. 698; Roberts v. Fagan, 76 Kan. 536, 92 P. 559; Pettiford v. Loellner, 45 Mich. 358, 8 N. W. 57; Becklin v. Becklin, 99 Minn. 307, 109 N. W. 243; State v. Doyle, 107 Minn. 498, 120 N. W. 902; Hinkle v. Lovelace, 204 Mo. 208, 102 S. W. 1015; Perry v. District Court of Seventh Judicial Dist. in and for Esmeralda County (Nev.), 174 P. 1058; Perweiler v. Perweiler, 160 N. Y. S. 785 (affidavit of plaintiff alone is insufficient); Cordray v. Cordray, 19 Okla. 36, 91 P. 781; McFarlane v. Cornelius, 43 Ore. 513, 73 P. 325 (need not negative possibility of substituted service); Young v. Young (Tex. Civ. App. 1910), 127 S. W. 898 (affidavit that plaintiff did not know "whereabouts" of defendant is insufficient); Griffin v. Griffin, 54 Tex. Civ. App. 619, 117 S. W. 910; Yates v. Yates, 115 Va. 678, 79 S. E. 1040; Goore v. Goore, 24 Wash. 139, 63 P. 1092. See Kunzi v. Hickmon, 243 Mo. 103, 147 S. W. 1002 (service by publication insufficient); *In re* Geith's Estate, 129 Wis. 498, 109 N. W. 552 (after sheriff's return of absence of defendant).

33. Bellinger v. Devine, 269 Ill. 72, 109 N. E. 666 (Beatrice K. sufficiently designated as B. N.); McDermott v. Gray, 198 Mo. 266, 95 S. W. 431 (initials sufficient where defendant used his initials only in business); Burge v. Burge, 94 Mo. App. 15, 67 S. W. 703 (Emma insufficient where real name was Emily).

suit,[34] and be filed before process is issued,[35] with notice by mail,[36] with advertisement and return day as provided in the statute.[37]

An affidavit that the whereabouts of the defendant are unknown and cannot be ascertained is sufficient to show diligent inquiry.[38]

The affidavit of service by publication should be complete, but even if it does not show sufficient publication this may be a mere irregularity not affecting the jurisdiction.[39]

§ 1524. Injunction Against Interference with Spouse.

The powers of the court may be used in a proper case for enjoining a husband from interfering with the person or property of the wife pending a suit for divorce.[40]

34. Scott v. Scott, 85 A. 1022; Brant v. Brant, 71 N. J. Eq. 66, 71 A. 350.

35. Priestman v. Priestman, 103 Ia. 320, 72 N. W. 535.

Where an order for the publication of summons in an action for divorce was not made until a month after the affidavit was filed, the affidavit no longer constituted *prima facie* evidence of the residence of the defendant and the order was therefore void. Atkinson v. Atkinson, 43 Utah, 53, 134 P. 595.

36. Rodgers v. Nichols, 15 Okla. 579, 83 P. 923.

37. Gordon v. Munn, 87 Kan. 624, 125 P. 1, rehearing denied 88 Kan. 72, 127 P. 764; Stone v. Stone, 134 Mo. App. 242, 113 S. W. 1157; Godfree v. Godfree, 152 N. Y. S. 257, 166 App. Div. 694 (order for service either by publication or personally without State is defective); Banks v. Banks, 189 Pa. St. 196, 29 Pittsb. Leg. J. (N. S.) 251, 42 A. 111, 43 W. N. C. 354; Bibelhausen v. Bibelhausen, 159 Wis. 365, 150 N. W. 516.

38. Bell v. Bell, 97 Kan. 616, 156 P. 778; Peeling v. Peeling, 161 N. Y. S. 963 (affidavit that defendant is concealing herself).

39. Allen v. Allen, 126 Ark. 164, 189 S. W. 841.

40. Schooler v. Schooler, 74 Ga. 345; Lyon v. Lyon, 102 Ga. 453, 31 S. E. 34, 66 Am. St. R. 189, 42 L. R. A. 194; Robinson v. Robinson, 123 N. C. 136, 31 S. E. 371.

CHAPTER VIII.

PLEADINGS.

SECTION 1525. Libel.
1526. Libel Must Allege Jurisdictional Facts.
1527. Statement of Grounds of Divorce.
1528. Allegations of Cruelty.
1529. Allegations of Desertion.
1530. Issues Confined to Pleadings.
1531. Nothing May Be Waived by Pleadings.
1532. Answer.
1533. Terms Imposed on Defaulting Defendant Before Answer.
1534. Pleading Insanity.
1535. Pleading Condonation.
1536. Pleading Recrimination.
1537. Cross-Bills.

§ 1525. Libel.

Divorce proceedings are begun by the plaintiff in the proper court and under the proper statute, by means of what is usually called a libel or petition; that is to say, in the form of a written statement, by the complainant or libellee, of his or her cause of action, and of the relief sought. This libel, which has been of essentially the same character from the earliest times, in English ecclesiastical and admiralty courts, and resembles the bill in chancery, is derived from the Roman civil law, and originates still earlier, probably, in that petition to sovereign authority which has been characteristic of governments pursuing written formulas in all ages. The libel states by way of narrative all points essential to a right comprehension of the case. This narrative should be specific, clear, and full. The plaintiff's name and description should be given, also the defendant's name and description; the court should be designated and respectfully addressed; the relief desired should be stated, and the grounds upon which that relief is sought; the material facts should be stated with reasonable exactness as to time and circumstances. In every libel for divorce,

marriage with the defendant should be alleged; likewise faithfulness on the plaintiff's part, and a sufficient breach of matrimonial duty by the defendant, such breach being set forth; and, in short, every fact which the statute imports as a prerequisite to granting the relief prayed for.[41]

Local practice must determine the precise form of the libel, just as local statute defines the substance of divorce remedies. It is the safer course to adhere in the main to statute expression with reference to the matrimonial breach justifying a divorce, and to make all allegations which the statute seems to require. A petition for divorce ought to set forth the causes of the complaint in the words of the statute or their equivalent, and circumstances of time and place with reasonable certainty; in order that the defendant may be apprised of the matrimonial breach complained of and prepare his defence understandingly, and so, too, that the court may judge whether, the allegations being proved, the general charge is supported.[42] But a libellant is not confined to a single ground; for, according to the universal practice in England and the United States, various and distinct wrongs, entitling the aggrieved party to the same sort of relief, whether this be a total or partial divorce, may be united in one libel, each wrong being distinctly stated, and the court granting relief upon one or more grounds, according to the testimony produced. But where the statute relief afforded for one wrong is a divorce from bed and board, and for another a divorce from bond of matrimony, the two cannot be united under one and the same petition, in strict matrimonial practice, though there are States which favor such a procedure, and permit, as in common-law actions, that allegations or counts be united, leaving the court to decide as between them.[43]

The libel for divorce should set forth clearly the requisites for

41. 3 Law Eccl. Law, 17, 147; Shelf. Mar. & Div. 506.

42. See Crawford v. Crawford, 17 Fla. 480; Randall v. Randall, 31 Mich. 194.

43. Johnson v. Johnson, 6 Johns. Ch. 163; and Young v. Young, 4 Mass. 430.

a decree,[44] including the residence of the parties[45] for the statutory period,[46] the fact, legality and usually the date of

44. Prall v. Prall, 58 Fla. 496, 50 So. 867; Hancock v. Hancock, 55 Fla. 630, 45 So. 1020, 15 L. R. A. (N. S.) 670; McCord v. McCord, 140 Ga. 170, 78 S. E. 833 (schedule of property of parties is unnecessary); Griffin v. Griffin, 130 Ga. 527, 61 S. E. 16; Knol v. Knol, 171 Ill. App. 412; Hays v. Hays, 40 Ind. App. 471, 82 N. E. 90; Cole v. Cole, 113 Me. 358, 94 A. 120; Sanders v. Sanders, 157 N. C. 229, 72 S. E. 876 (need not set out facts on which belief based); Jones v. Jones, 173 N. C. 279, 91 S. E. 960 (need not allege that facts therein stated had existed to plaintiff's knowledge for six months); Fraser v. Fraser, 78 N. J. Eq. 296, 81 A. 1133, affirming decree (Ch. 1910) 77 N. J. Eq. 205, 75 A. 979; Brant v. Brant, 71 N. J. Eq. 66, 71 A. 350 (affidavit of noncollusion); Ackerman v. Ackerman, 108 N. Y. S. 534, 123 App. Div. 750; Jones v. Jones, 60 Tex. 451; Rowden v. Rowden (Tex. Civ. App.), 212 S. W. 302; Benson v. Benson, 45 Utah, 514, 146 P. 564. See Fraser v. Fraser, 77 N. J. Eq. 205, 75 A. 979 (may also pray for avoidance of fraudulent decree).

45. Olson v. Olson, 4 Alaska, 624 (statement that a resident enough where law requires statement that an inhabitant); Johnson v. Johnson, 30 Colo. 402, 70 P. 692; Sindowski v. Sindowski, 84 A. 805; Tobias v. Tobias, 208 Ill. App. 539 (petition describing petitioner as "of Peoria in the county of Peoria, State of Illinois" is sufficient allegation of residence); Miller v. Miller, 55 Ind. App. 644, 104 N. E. 588; Main v. Main (Ia.), 163 N. W. 364; Scott v. Scott, 174 Ia. 740, 156 N. W. 834; Gelwicks v. Gelwicks, 160 Ia. 675, 142 N. W. 409 (failure to allege residence a mere irregularity); Etheridge v. Etheridge, 120 Md. 11, 87 A. 497 (allegation in prayer for process is sufficient); McGee v. McGee, 161 Mo. App. 40, 143 S. W. 77; Parrish v. Parrish, 52 Ore. 160, 96 P. 1066; Mauser v. Mauser, 59 Pa. Super. Ct. 275; Gamblin v. Gamblin, 52 Tex. Civ. App. 479, 114 S. W. 408; Forsythe v. Forsythe (Tex. Civ. App.), 149 S. W. 198; Bloch v. Bloch (Tex. Civ. App.), 190 S. W. 528.

It is not necessary that a pleading in an action for divorce adopt the exact terms of the statute as to the jurisdictional fact of residence, but it is sufficient that the averments convey the same idea in equivalent terms. Martin v. Martin, 173 Ala. 106, 55 So. 632.

46. Wright v. Wright (Ala.), 76 So. 431; Anderson v. Anderson, 5 Alaska, 138; Flynn v. Flynn, 171 Cal. 746, 154 P. 837 (although allegation as to good faith omitted); Beekman v. Beekman, 53 Fla. 858, 43 So. 923; Prall v. Prall, 58 Fla. 496, 50 So. 867; Polson v. Polson, 140 Ind. 310, 39 N. E. 498; Canther v. Canther, 46 Ind. App. 504, 91 N. E. 813; Thelan v. Thelan, 75 Minn. 433, 78 N. W. 108; Keller v. Keller, 144 Mo. App. 98, 129 S. W. 492 ("next before" the filing of the petition); Robinson v. Robinson, 149 Mo. App. 733, 129 S. W. 725; Garver v. Garver, 145 Mo. App. 353, 130 S. W. 369; Stansbury v. Stansbury, 118 Mo. App. 427, 94

marriage,[47] matrimonial domicile,[48] and the grounds for divorce.[49]

§ 1526. Libel Must Allege Jurisdictional Facts.

As the jurisdiction of the courts in divorce is statutory only,[50] all jurisdictional facts as to the domicile of the parties required by the statute must be alleged in the petition.[51]

§ 1527. Statement of Grounds of Divorce.

The grounds of divorce should be set up with sufficient particularity to enable the defendant to prepare his defence whether the

S. W. 566; Johnson v. Johnson, 95 Mo. App. 329, 68 S. W. 971; Hinrichs v. Hinrichs, 84 Mo. App. 27; Gordon v. Gordon, 128 Mo. App. 710, 107 S. W. 410; Cole v. Cole, 3 Mo. App. 571, memorandum; Rumping v. Rumping, 36 Mont. 39, 91 P. 1057, 12 L. R. A. (N. S.) 1197; Metzler v. Metzler (N. J. Ch. 1908), 69 A. 965; Uhl v. Irwin, 3 Okla. 388, 41 P. 376; Holton v. Holton, 64 Ore. 290, 129 P. 532; Owens v. Owens (Tex. 1905), 90 S. W. 664; Coward v. Sutfin (Tex. Civ. App.), 185 S. W. 378; Needles v. Needles (Tex. Civ. App. 1900), 54 S. W. 1070; Luce v. Luce, 15 Wash. 608, 47 P. 21; Ramsdell v. Ramsdell, 47 Wash. 444, 92 P. 278.

47. Cole v. Cole, 113 Me. 358, 94 A. 120; Flanagan v. Flanagan, 116 Mich. 185, 74 N. W. 460, 4 Det. Leg. N. 1084.

Where the petition denies the existence of a marriage there can be no divorce. Appeal of Culp (Pa. 1882), 4 Walk. 131.

It is enough for the bill for divorce to allege that the parties were married, without stating that they were lawfully married; it being assumed, till the contrary is shown, that the marriage was lawful. Etheridge v. Etheridge, 120 Md. 11, 87 A. 497.

48. Aspinwall v. Aspinwall (Nev.), 160 P. 263; Jennings v. McDougal (W. Va.). 98 S. E. 162.

49. Polson v. Polson, 140 Ind. 310, 39 N. E. 498; Wallace v. Wallace (Mo. App.), 194 S. W. 523 ("habits of drunkenness" is sufficient statement of "habitual drunkenness"); McCann v. McCann, 91 Mo. App. 1; Newton v. Newton, 86 N. J. Eq. 129, 97 A. 294 (condonation is a defence and need not be negatived in complaint); Braun v. Braun, 194 Pa. St. 287, 44 A. 1096, 75 Am. St. R. 699; M—— v. M——, 2 Tenn. Ch. App. 463.

50. State v. Templeton, 18 N. D. 525, 123 N. W. 283; Koehl v. Koehl, 156 N. Y. S. 234, 92 Misc. 579.

51. Terrill v. Terrill, 2 Alaska, 475; Rose v. Rose, 156 N. W. 664; Sharpe v. Sharpe, 134 Mo. App. 278, 114 S. W. 584; Stone v. Stone, 134 Mo. App. 242, 113 S. W. 1157; Gallagher v. Gallagher (Tex. Civ. App.), 214 S. W. 516; Davenport v. Davenport, 106 Va. 736, 56 S. E. 562.

ground be adultery,[52] when the name of the co-respondent should be stated if known, if unknown that fact should be stated,[53] or drunkenness,[54] or physical incapacity.[55] The adultery or other acts relied on may be charged as committed within certain dates,[56] but the exact date and place of each particular act need not be set forth.[57] The libel must allege that the acts were committed within the State where this is jurisdictional.[58]

§ 1528. Allegations of Cruelty.

The cruel and abusive treatment relied on should be set out with sufficient particularity,[59] and the degree of cruelty required must

52. Lawrence v. Lawrence, 141 Ala. 356, 37 So. 379; Bishop v. Bishop, 155 Ky. 679, 160 S. W. 176; Newton v. Newton, 86 N. J. Eq. 129, 97 A. 294; Evans v. Evans, 57 N. Y. S. 274, 27 Misc. 10; Weedon v. Weedon, 34 Pa. Super. Ct. 358; Fitzpatrick v. Fitzpatrick, 173 S. W. 444; Evans v. Evans (Tenn. Ch. App. 1900), 57 S. W. 367 (place need not be alleged by street and number if city is stated); White v. White, 121 Va. 244, 92 S. E. 811. See Kinney v. Kinney, 149 N. C. 321, 63 S. E. 97 (plaintiff's knowledge of adultery).

"Adulterous life" is insufficient. A bill of divorce which alleges that "the defendant has for a considerable time past given himself over to adulterous practices and is now living an adulterous life" does not show ground for relief. Hahn v. Hahn, 136 Ill. App. 301.

53. Wilkerson v. Wilkerson, 3 Cal. App. 204, 84 P. 784; Hahn v. Hahn, 136 Ill. App. 301; Anderson v. Anderson, 78 W. Va. 118, 88 S. E. 653.

54. *Drunkenness.* A bill which alleges that the respondent has become addicted to habitual drunkenness contains a sufficient allegation that he is addicted to the habit when bill is filed, and the particular acts need not be set forth. MacMahon v. MacMahon, 170 Ala. 338, 54 So. 165; Hubbell v. Hubbell, 7 Cal. App. 661, 95 P. 664 (facts and not evidence).

55. Hobbs v. Hobbs, 10 Cal. App. 97, 101 P. 22.

56. Addicks v. Addicks (Del. Super. 1894), 1 Marv. 338, 41 A. 78; Woog v. Woog, 69 N. Y. S. 555, 58 App. Div. 620, 69 N. Y. S. 555.

57. Wilkerson v. Wilkerson, 3 Cal. App. 204, 37 So. 379 (places where adultery committed need not be stated); Wellman v. Wellman, 191 Ill. App. 514.

The time and place of the adultery relied on as ground for divorce must be alleged, also the name of the accomplice; otherwise the same cannot be proved. Jenkins v. Maier, 118 La. 130, 42 So. 722.

58. Robinson v. Robinson, 149 Mo. App. 733, 129 S. W. 725.

59. Dunn v. Dunn, 170 S. W. 234; Grierson v. Grierson, 156 Cal. 434, 105 P. 120; Mayr v. Mayr, 161 Cal. 134, 118 P. 546; Hubbell v. Hubbell,

be stated in the words of the statute,[60] but the time and place need not be stated with exactness.[61]

7 Cal. App. 661, 95 P. 664; Taylor v. Taylor, 63 Fla. 659, 58 So. 238; Ray v. Ray, 63 Fla. 558, 57 So. 609; Prall v. Prall, 56 Fla. 521, 47 So. 916; Pierce v. Pierce, 145 Ga. 886, 89 S. E. 1045; Dickinson v. Dickinson, 54 Ind. App. 53, 102 N. E. 389; Massey v. Massey, 80 N. E. 977, rehearing denied 40 Ind. App. 407, 81 N. E. 732; Spitzmesser v. Spitzmesser, 26 Ind. App. 532, 60 N. E. 315; Pierce v. Pierce (Miss. 1905), 38 So. 46; Marolf v. Marolf, 191 Mo. App. 239, 177 S. W. 819; Tripp v. Tripp, 78 Mo. App. 413; Fagan v. Fagan, 82 Neb. 388, 117 N. W. 992; Dakin v. Dakin, 1 Neb. unoff. 457, 95 N. W. 781; Kapp v. District Court of Seventh Judicial Dist., 31 Nev. 444, 103 P. 235; McAllister v. McAllister, 37 Nev. 92, 139 P. 781; Hodecker v. Hodecker, 46 N. Y. S. 1073, 20 Misc. 641; Walker v. Walker, 94 A. 672, granting rehearing 93 A. 36; Fitzgerald v. Fitzgerald (Tex. Civ. App.), 168 S. W. 452; Dawson v. Dawson (Tex. Civ. App. 1910), 132 S. W. 379; Gamblin v. Gamblin, 52 Tex. Civ. App. 479, 114 S. W. 408 ("unendurable" same as "insupportable"); Golding v. Golding, 49 Tex. Civ. App. 176, 108 S. W. 496; Denning v. Denning (Tex. Civ. App. 1907), 99 S. W. 1029 (in defamation must allege to whom statements made); Crossett v. Crossett (Tex. Civ. App. 1908), 121 S. W. 358; Bloch v. Bloch (Tex. Civ. App.), 190 S. W. 528; Rowden v. Rowden (Tex. Civ. App.), 212 S. W. 302 ("cruel, harsh and inhuman treatment," the words of the statute is insufficient); Trimble v. Trimble, 97 Va. 217, 33 S. E. 531.

Tautology is not a ground for demurrer although the statute states that the facts shall be set forth without repetition. Blanton v. Blanton (Ala.), 67 So. 1000.

An insufficient complaint cannot be cured by verdict. Martin v. Martin, 130 N. C. 27, 40 S. E. 822.

The allegations were held insufficient in the following cases: Smith v. Smith, 124 Cal. 651, 57 P. 573; Geisseman v. Geisseman, 34 Colo. 431, 83 P. 635; Hickson v. Hickson, 54 Fla. 556, 45 So. 474; Benson v. Benson, 45 Utah, 514, 146 P. 564 (undue familiarity with other men); Stanley v. Stanley, 24 Wash. 460, 64 P. 732.

Where the parties were living together at the time of the filing of the libel an allegation that the defendant made it impossible for the plaintiff to live with him is inconsistent and renders the complaint demurrable. Hays v. Hays, 40 Ind. App. 471, 82 N. E. 90.

60. Nelson v. Nelson, 18 Cal. 602, 123 P. 1099; Wagner v. Wagner (Del. Super. 1901), 51 A. 603, 3 Pennewill, 303; Trenchard v. Trenchard, 245 Ill. 313, 92 N. E. 243; Ryan v. Ryan, 33 Mont. 406, 84 P. 494; Saillard v. Saillard, 2 Tenn. Ch. App. 396.

Language of statute sufficient. A bill for divorce *a mensa et thoro* is sufficient if it charges the grounds, abandonment and desertion, cruelty, and vicious conduct, in the language of the statute, without setting out the facts evidencing them. Etheridge v. Etheridge, 120 Md. 11, 87 A. 497.

61. Lynch v. Lynch, 138 La. 1094, 71 So. 195; Klaus v. Klaus, 162 Wis. 549, 156 N. W. 963.

The petition need not state that the acts of cruelty were committed without the plaintiff's fault.[62]

§ 1529. Allegations of Desertion.

A petition for divorce for desertion must contain all the elements required by the statute,[63] and may also properly aver an abandonment as giving weight to cruelty alleged.[64]

§ 1530. Issues Confined to Pleadings.

The issues and proof are confined to the matters set out in the pleadings,[65] but facts that give character to the specified facts

62. Harvey v. Harvey, 175 N. Y. S. 177; Dowdy v. Dowdy, 154 N. C. 556, 70 S. E. 917; Rebstock v. Bebstock, 144 N. Y. S. 289.

Absence of provocation should be alleged according to some authorities. Garsed v. Garsed, 170 N. C. 672, 87 S. E. 45.

63. Krzepicki v. Krzepicki, 167 Cal. 449, 140 P. 13; Sheridan v. Sheridan, 134 Cal. 88, 66 P. 73; Vosburg v. Vosburg, 136 Cal. 195, 68 P. 694; Rogers v. Rogers, 57 Colo. 132, 140 P. 193; Fielding v. Fielding, 64 So. 546; Hahn v. Hahn, 136 Ill. App. 301; Reed v. Reed, 180 Ind. 511, 103 N. E. 324; Lewis v. Lewis, 36 Ind. 218; Prather v. Prather, 26 Kan. 273; Powell v. Powell, 58 Mich. 299, 25 N. W. 199; Van Horn v. Van Horn, 82 Mo. App. 79; McLane v. McLane, 88 Neb. 833, 130 N. W. 745; Ladd v. Ladd, 121 N. C. 118, 28 S. E. 190; Metzler v. Metzler (N. J. Ch. 1908), 69 A. 965; Thomas v. Thomas, 74 A. 125; Foote v. Foote (N. J. Ch. 1905), 61 A. 90; Smithkin v. Smithkin, 62 N. J. Eq. 161; M—— v. M——, 2 Tenn. Ch. App. 463; O'Farrell v. O'Farrel (Tex. Civ. App.), 119 S. W. 899.

64. Wright v. Wright (Ala.), 76 So. 431.

65. Mini v. Mini, 114 Cal. xvii., 45 P. 1044; Cairns v. Cairns, 29 Colo. 260, 68 P. 233, 93 Am. St. R. 55; Yates v. Yates, 36 App. D. C. 518; Bratton v. Bratton, 62 Fla. 442, 56 So. 411; Elzas v. Elzas, 183 Ill. 132, 83 Ill. App. 519, affd. 55 N. E. 673 (evidence of plaintiff's adultery is inadmissible where defendant denies the marriage); Winterberg v. Winterberg, 177 Ill. App. 493; Buswell v. Buswell, 146 Ia. 52, 124 N. W. 770 (adultery on dates specified); Gastauer v. Gastauer, 132 La. 941, 61 So. 879; Trudeau v. Trudeau (La. 1823), 1 Mart. N. S. 128; Hubbard v. Hubbard, 127 Md. 617, 96 A. 860; Wheeler v. Wheeler, 101 M. D. 427, 61 A. 216; Green v. Green, 26 Mich. 437; Banks v. Banks (Miss.), 79 So. 841; Wagner v. Wagner, 6 Mo. App. 573, memorandum; Miller v. Miller, 13 Mo. App. 591, memorandum; Kinney v. Kinney, 149 N. C. 321, 63 S. E. 97; Grady v. Grady (N. J. Ch. 1906), 64 A. 440;

alleged may be shown in corroboration,[66] and specifications should not be required to prevent the plaintiff from proving his case by general confessions or by evidence of a general course of conduct,[67] and a defence which appears by the evidence may be a bar though not pleaded.[68]

The evidence need not be closely confined to the dates set out in the pleadings.[69]

§ 1531. Nothing May Be Waived by Pleadings.

The peculiarity of the divorce suit is, as already stated, that the public is a silent party interested in it, and this fact results in the general principle that nothing can be waived or taken as true on agreement of parties.[70] Hence admissions in the pleadings will not waive proof of jurisdictional facts,[71] and necessary facts must be proved although not denied,[72] and the presiding judge, as the

Lowenthal v. Lowenthal, 157 N. Y. 236, 51 N. E. 995; Wirth v. Wirth, 172 N. Y. S. 309; Silberstein v. Silberstein, 141 N. Y. S. 376, 156 App. Div. 689 (general denial raises question whether wife justified in leaving husband); Lyon v. Lyon, 39 Okla. 111, 134 P. 650; Allen v. Allen (Tex. Civ. App. 1910), 128 S. W. 697; Cuneo v. De Cuneo, 24 Tex. Civ. App. 436, 59 S. W. 284 (common-law marriage proved under allegation of marriage); Craig v. Craig, 87 S. E. 727 (on plea of *res judicata* all testimony in record of original suit may be admitted); Branscheid v. Branscheid, 27 Wash. 398, 67 P. 812.

A general denial puts in issue the desertion charged, and any evidence tending to show that the separation and living apart were with plaintiff's consent is admissible. Patrick v. Patrick, 139 Wis. 463, 121 N. W. 130.

66. Wellman v. Wellman, 191 Ill. App. 514; Briggs v. Briggs, 20 Mich. 34; Westphal v. Westphal, 81 Minn. 242, 83 N. W. 988 (acts of cruelty); Tully v. Tully, 59 N. Y. S. 818, 28 Misc. 54; Lutz v. Lutz, 59 N. Y. S. 972, 28 Misc. 393.

67. Ketcham v. Ketcham, 52 N. Y. S. 961; Krauss v. Krauss, 77 N. Y. S. 203, 73 App. Div. 509, 11 N. Y. Ann. Cas. 194; Hoernig v. Hoernig, 109 Wis. 229, 85 N. W. 346.

68. Pooley v. Pooley, 178 Ia. 19, 157 N. W. 129 (interference by plaintiff's mother may be shown under general denial); Bethel v. Bethel, 181 Mo. App. 601, 164 S. W. 682.

69. Wilhelm v. Wilhelm (Ore.), 177 P. 57.

70. See further *post*, § 1484.

71. Coleman v. Coleman, 23 Cal. App. 423, 138 P. 362; Lagerholm v. Lagerholm, 133 Mo. App. 306, 112 S. W. 720.

72. Johnson v. Johnson, 182 S. W. 897; Nelson v. Nelson, 18 Cal. App. 602, 123 P. 1099.

Estoppel. Barringer v. Dauernheim, 127 La. 679, 53 So. 923.

representative of the people, may make material inquiries even as to matters not covered by the pleadings.[73]

§ 1532. Answer.

The procedure in divorce causes, while requiring constant reference to local codes, will be found flexible and well adapted to securing substantial justice throughout. A striking instance of this is found in the facilities afforded the spouse against whom the libel is brought for making a defence. As for the response, a written answer of some kind, whether by way of general denial or so as to allege special matter in defence, should be filed by a defendant who means to contest the libel.

The answer to the libel must be specific and admit of only one interpretation.[74] The defendant is bound by an admission contained in his answer,[75] but an admission in the answer is not enough without proof either of a cause for divorce [76] or of a jurisdictional fact,[77] but where the fact of marriage is set up both in the bill and the answer the court may, without other evidence, properly find that a marriage existed.[78] The answer should set up any affirmative defence [79] with the same particularity as if alleged in the libel.[80]

73. Newman v. Newman, 211 Mass. 508, 98 N. E. 507.

74. Lyons v. Lyons, 272 Ill. 329, 111 N. E. 977, 196 Ill. App. 73 (admission that plaintiff a resident of State "for many years last past" is sufficient statement of one year's residence preceding the libel); Fairchild v. Fairchild, 43 N. J. Eq. (16 Stew.) 473, 11 A. 426; Allen v. Allen, 110 N. Y. S. 303, 125 App. Div. 838 (denial of knowledge of marriage).

75. Lyons v. Lyons, 272 Ill. 329, 196 Ill. App. 73, 111 N. E. 977; Doeme v. Doeme, 89 N. Y. S. 215, 96 App. Div. 284.

76. Taylor v. Taylor, 108 N. Y. S. 428, 123 App. Div. 220.

77. Bradfield v. Bradfield, 154 Mich. 115, 117 N. W. 588, 15 Det. Leg. N. 660.

78. Paul v. Paul, 201 Ill. App. 595.

79. Banks v. Banks, 67 A. 853; Dillinger v. Dillinger, 140 Ill. App. 6; Stevens v. Stevens, 123 Ky. 545, 96 S. W. 811, 29 Ky. Law Rep. 953; Kinney v. Kinney, 149 N. C. 321, 63 S. E. 97; Allen v. Allen, 110 N. Y. S. 303, 125 App. Div. 838; Oster v. Oster (Tex. Civ. App. 1910), 130 S. W. 265.

80. Bancroft v. Bancroft, 85 A.

§ 1533. Terms Imposed on Defaulting Defendant Before Answer.

Leave to file an answer in divorce late is commonly granted as a matter of course,[81] but a defaulting defendant may be allowed to answer only on terms of payment of temporary alimony and counsel fees, where these terms are not unreasonable in relation to the means of the defendant.[82]

§ 1534. Pleading Insanity.

Insanity must be specially pleaded if relied on as a defence.[83]

§ 1535. Pleading Condonation.

Condonation should usually be pleaded by the defendant in order to be taken advantage of,[84] but where condonation appears though not pleaded the divorce will be denied.[85]

§ 1536. Pleading Recrimination.

Recrimination must be pleaded before evidence of it can be admitted.[86]

561; Arrowsmith v. Arrowsmith (N. J. Ch. 1909), 71 A. 702; McNeir v. McNeir, 129 N. Y. S. 481.

81. Wilber v. Wilber (N. J.), 105 A. 664.

A defendant should on request be permitted to defend in a divorce case at any time before the final decree is signed, except where clearly wanting in good faith. Grant v. Grant, 84 N. J. Eq. 81, 92 A. 791.

82. Bennett v. Bennett, 28 S. Ct. 356, 208 U. S. 505, 52 L. Ed. 590; Howatt v. Howatt, 142 N. Y. S. 908, 158 App. Div. 28; Schoeller v. Schoeller, 161 N. Y. S. 399. See, however, *post.*

83. Anderson v. Anderson, 89 Neb. 570, 131 N. W. 907; Laudo v. Laudo, 177 N. Y. S. 396.

84. Neeley v. Neeley (Cal.), 176 P. 163; O'Rourke v. O'Rourke, 58 Colo. 300, 144 P. 390; Klekamp v. Klekamp, 275 Ill. 98, 113 N. E. 852; Skinner v. Skinner, 47 Ind. App. 670, 95 N. E. 128; Breedlove v. Breedlove, 27 Ind. App. 560, 61 N. E. 797; Delany v. Delany, 69 N. J. Eq. 602, 61 A. 266, 65 A. 217.

85. Wallace v. Wallace, 171 Ky. 192, 188 S. W. 331. See Ferguson v. Ferguson, 145 Mich. 290, 108 N. W. 682, 13 Det. Leg. N. 453; Karger v. Karger, 44 N. Y. S. 219, 26 Civ. Proc. R. 161, 19 Misc. 236; White v. White, 121 Va. 244, 92 S. E. 811. See Bordeaux v. Bordeaux, 32 Mont. 159, 80 P. 6 (where though condonation not pleaded issue has been contested without objection divorce denied). See Shackett v. Shackett, 49 Vt. 195.

86. Geisselman v. Geisselman (Md.),

§ 1537. Cross-Bills.

In many States the defendant may now allege, either by way of recrimination or cross-petition, the commission of some offence by the plaintiff, which is equally reprehensible as a cause for divorce. By means of a cross-bill, in fact, either the defence may be aided or affirmative relief sought, so that the right to divorce becomes viewed with reference to both parties alike,[87] but a statute authorizing such a counterclaim does not permit such a counterclaim to annul the marriage or when based on facts which would annul it.[88] And if both parties have equal right to divorce, neither party has, because neither is innocent.

Where the husband files a bill in equity alleging that he is entitled to the society and services of his wife, and that she is engaging in a business in competition with his and seeks to enjoin her from doing so, it is proper for her to file a cross-bill for divorce. If she can by the cross-bill secure a divorce, she deprives him of the only ground on which the husband can maintain his bill and the cross-bill is therefore germane.[89]

107 A. 185; Newman v. Newman, 211 Mass. 508, 98 N. E. 507 (not under general denial); Thompson v. Thompson, 111 N. Y. S. 426, 127 App. Div. 296; Jackson v. Jackson, 49 Pa. Super. Ct. 18; Hartman v. Hartman (Tex. Civ. App.), 190 S. W. 846.

87. Friedrich v. Friedrich, 230 Mass. 59, 119 N. E. 449 (by general practice); Berdolt v. Berdolt, 56 Neb. 792, 77 N. W. 399; Cook v. Cook, 159 N. C. 46, 74 S. E. 639; *contra*, Sharpe v. Sharpe, 134 Mo. App. 278, 114 S. W. 584.

88. Taylor v. Taylor, 5 N. Y. S. 1052, 28 Civ. Proc. R. 323, 25 Misc. 566; Durham v. Durham, 91 N. Y. S. 295, 99 App. Div. 450, 34 Civ. Proc. R. 141.

89. Root v. Root (Mich.), 130 N. W. 194, 32 L. R. A. (N. S.) 837.

CHAPTER IX.

GROUNDS OF DIVORCE IN GENERAL.

SECTION 1538. What Law Governs Rights in General.
1539. Whether Statutes Retroactive.
1540. Right of Each State to Name Causes of Divorce.
1541. Divorce Only for Some Cause Named by Statute.
1542. Certainty in Statute.
1543. Breach of Antenuptial Agreement.
1544. Separation.
1545. Statutory Distinction Between Divorce and Separation.
1546. Right to Divorce Is Absolute When Cause Shown.

§ 1538. What Law Governs Rights in General.[90]

The right to divorce depends on the law in force at the domicile of the parties is the general rule commonly stated,[91] but it is also held that an act to be a good cause for divorce must be such in the place where the act was committed.[92]

Although the rights of the parties are governed by the law in force at the domicile of the parties, still, where the husband deserts the wife in a State where desertion is not a ground for divorce, she may move to another State where desertion is a ground for divorce and there obtain a divorce on the ground of desertion, desertion not being a specific act but a continued course of conduct.[93]

§ 1539. Whether Statutes Retroactive.

In the construction of divorce statutes the opinion is a reasonable one, that a new act shall not be presumed to include previous offences of the kind, so as to justify divorce in consequence of that

90. The many questions relating to conflict of laws in divorce will be found more fully treated *post*, § 1953 *et seq.*

91. Kapigian v. Der Minassian, 212 Mass. 412, 99 N. E. 264.

92. Pope v. Pope, 161 Ky. 104, 170 S. W. 504.

93. Mullenband v. Mullenband (Ark.), 208 S. W. 801.

which did not justify at the time of its commission,[94] and hence it must be shown that the ground existed after the statute went into effect.[95] Thus, if desertion for a certain continuous period, or imprisonment in the State prison for felony, be made a new cause, the legislative intendment will be that a previous period of desertion shall not be computed, nor a previous imprisonment.[96] Such, however, is not necessarily or absolutely the case; for statutes may and do refer to pre-existing causes of divorce, to offences present as well as future; and where a statute is plainly worded to that effect, it must be so upheld,[97] and a law relating to desertion may apply although part of the time of desertion relied on took place before the passage of the statute.[98]

Mr. Bishop inclines, in all cases of doubtful language, to presume that past as well as future offences were to be included; but where the act in question establishes an entirely new ground of divorce, it does not seem to us fair to give the presumption any such latitude.

But in the United States this inquiry leads further to the consideration of objections grounded in the several State constitutions, where may be found clauses forbidding retrospective laws, or laws which impair the obligations of contracts. A retrospective law, says Story, is one which "takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past."[99] But the terms "vested rights"

94. Scott v. Scott, 6 Ohio, 534; Jarvis v. Jarvis, 3 Edw. Ch. 462; Given v. Marr, 27 Me. 212.

95. Burt v. Burt, 168 Mass. 204, 46 N. E. 622; Pierce v. Pierce (Wash.), 181 P. 24 (separation for eight years). See Hava v. Chavigny (La.), 78 So. 594 (living apart for seven years regardless of date of passage of statute).

96. Greenlaw v. Greenlaw, 12 N. H. 200; *contra*, Long v. Long (Minn.), 160 N. W. 687 (sentences to imprisonment before passage of statute are cause for divorce).

97. Stevens v. Stevens, 1 Met. 279; Cole v. Cole, 27 Wis. 531.

98. Hurry v. Hurry (La.), 81 So. 378. See Hurry v. Hurry, 141 La. 954, 76 So. 160 (living apart seven years regardless of date of statute).

99. Society v. Wheeler, 2 Gallis. 105, 139.

and "transactions" seem hardly appropriate to the status or relation of marriage where dissolution is sought; while that of "contract" is decidedly inappropriate. This point is not, however, very clearly adjudicated as yet. Some States maintain quite strenuously that the legislature cannot dissolve, or authorize the courts to dissolve, a marriage for a pre-existing cause of offence.[1] Other States, on the contrary, sustain all such enactments, asserting that "retrospective" acts, and acts "impairing the obligation of contracts," have no application whatever to the marriage institution and the reasons for dissolving it.[2] To this latter view Mr. Bishop inclines, at the same time suggesting that upon the property rights of parties to a dissolved marriage there is room for a constitutional distinction as against retroactive legislation.

Divorce legislation will usually be construed to apply only to actions instituted after its enactment,[3] although a statute relating to procedure may have a retroactive effect.[4]

§ 1540. Right of Each State to Name Causes of Divorce.

Each State has a right to prescribe for what causes divorce will be granted.[5]

§ 1541. Divorce Only for Some Cause Named by Statute.[6]

The marriage relation will be dissolved only for grave and substantial causes[7] allowed by law.[8]

1. Clark v. Clark, 10 N. H. 380, Given v. Marr, 27 Me. 212.

2. Jones v. Jones, 2 Overt. 2; Smith v. Smith, 3 S. & R. 248; Berthelemy v. Johnson, 3 B. Monr. 90.

3. Barrington v. Barrington (Ala.), 76 So. 81; Mansfield v. Mansfield, 26 Mo. 163.

4. Dabney v. Dabney, 20 App. D. C. 440; Jamison v. Ramsey, 128 Mich. 315, 87 N. W. 260, 8 Det. Leg. N. 711 (statute prescribing location of desertion).

5. Stewart v. Stewart (Idaho), 180 P. 165.

6. See *ante*, § 1481.

7. Trenchard v. Trenchard, 245 Ill. 313, 92 N. E. 243; Wallace v. Wallace, 171 Ky. 192, 188 S. W. 331; Taylor v. Taylor, 108 Md. 129, 69 A. 632; Rindlaub v. Rindlaub, 19 N. D. 352, 125 N. W. 479; Barker v. Barker, 25 Okla. 48, 105 P. 347.

8. Alexander v. Alexander, 140 Ind. 555, 38 N. E. 855; Moir v. Moir (Ia.), 165 N. W. 1001 (that living with a

§ 1542. Certainty in Statute.

A statute is not void for uncertainty which provides for divorce for drunkenness or cruelty, as these terms have a legal meaning which can be ascertained.[9]

§ 1543. Breach of Antenuptial Agreement.

The breach of an antenuptial agreement to give the wife a certain sum of money is not a cause for divorce.[10]

§ 1544. Separation.

The local statute must determine whether divorce *a mensa* or *a vinculo* shall be granted, or whether there may be a decree *nisi*, or whether the partial divorce shall ripen into the total afterwards. Judicial discretion is permitted by some codes in this respect, so that in the lighter offences enumerated for divorce from bed and board, the court may at pleasure grant total divorce instead.[11]

A separation from bed and board may usually be granted for any cause for which by law an absolute divorce is allowable,[12] and also for other causes.[13]

wife injured a man's health is not a cause for divorce). Main v. Main, 168 Ia. 353, 150 N. W. 590; Etheridge v. Etheridge, 120 Md. 11, 87 A. 497; Alexander v. Alexander, 165 N. C. 45, 80 S. E. 890; Umbach v. Umbach, 171 N. Y. S. 138, 183 App. Div. 495; Leefeld v. Leefeld, 85 Ore. 287, 166 P. 953; Johnsen v. Johnsen, 78 Wash. 423, 139 P. 189, rehearing denied, Id. 1200.

At common law jurisdiction to grant a divorce was only exercised where the marriage was void from the beginning. Sharpe v. Sharpe, 134 Mo. App. 278, 114 S. W. 584.

That the spouses believed they had been divorced by a previous unrecorded decree is no ground for granting a divorce on insufficient evidence, upon subsequent suit by the wife. Wiley v. Wiley, 171 Ia. 390, 151 N. W. 205.

Divorce can be granted only on legal grounds, and not merely because the court thinks the parties cannot live together in harmony. Voss v. Voss, 157 Wis. 430, 147 N. W. 634.

9. Maschaur v. Maschaur, 23 App. D. C. 87.

10. Wesley v. Wesley, 181 Ky. 135, 204 S. W. 165.

11. Browne's Digest of Divorce, Part I., Wisconsin.

12. Walker v. Walker (R. I.), 93 A. 36, 94 A. 672.

13. McClintock v. McClintock, 147 Ky. 409, 144 S. W. 68; McCampbell v. Campbell, 103 Ky. 745, 46 S. W. 18, 20 Ky. Law Rep. 552; Walker v.

§ 1545. Statutory Distinction Between Divorce and Separation.

A statute applying to divorce means an absolute divorce and not one from bed and board,[14] and the repeal of a divorce statute will not affect a statute relative to divorce from bed and board.[15]

§ 1546. Right to Divorce Is Absolute When Cause Shown

A libellant on proving a ground of divorce prescribed by statute is absolutely entitled to the divorce prayed for.[16]

Walker, 94 A. 672, granting rehearing 93 A. 36.

14. Gouge v. Gouge, 14 Ky. Law Rep. 571.

15. Bates v. Behen, 35 La. Ann. 872.

16. Phillips v. Phillips, 173 Ky. 608, 191 S. W. 482 (discretion of court is not arbitrary); Wald v. Wald, 119 Mo. App. 341, 96 S. W. 302; Meyer v. Meyer, 158 Mo. App. 299, 138 S. W. 70; Allfree v. Allfree, 175 Mo. App. 344, 162 S. W. 650.

Where one shows himself legally entitled to a divorce, it is the trial court's duty to grant it. Miles v. Miles, 137 Mo. App. 38, 119 S. W. 456.

CHAPTER X.

CAUSES EXISTING AT TIME OF MARRIAGE.

SECTION 1547. In General.
1548. Prior Unchastity or Pregnancy.
1549. Impotency.
1550. Venereal Disease at Time of Marriage.
1551. Existence of Prior Marriage.
1552. Fraud.
1553. Duress.

§ 1547. In General.

While an annulment proceeding is for some cause existing at the time of marriage, divorce is usually granted only for some cause arising after marriage,[17] and the fact that the marriage should never have been made on account of the diversity of age of the parties is no ground for divorce.[18]

§ 1548. Prior Unchastity or Pregnancy.

A divorce will not ordinarily be granted for antenuptial incontinence,[19] and even concealment by a woman of her prior unchastity is not a ground for divorce in Kentucky,[20] but concealment of the fact that one has been divorced for adultery may be such fraud as to entitle to divorce.[21]

That a woman induces a man to marry her by falsely stating that

17. Millar v. Millar (Cal.), 167 P. 394. As to annulment, see *ante*.

18. Platner v. Platner (Ia.), 162 N. W. 613.

19. Stanley v. Stanley, 115 Ga. 990, 42 S. E. 374; Bryant v. Bryant, 171 N. C. 746, 88 S. E. 147; Griggs v. Griggs (Tex. Civ. App. 1901), 61 S. W. 941.

That a wife, before marriage, was the kept woman of a married man was not a ground for divorce, where, after marrying, she endeavored to lead a decent, cleanly life. Rosenberger v. Rosenberger, 150 Ky. 803, 150 S. W. 1923.

20. Wesley v. Wesley, 181 Ky. 135, 204 S. W. 165.

21. Browning v. Browning, 89 Kan. 98, 130 P. 852.

she is pregnant is not ground for divorce,[22] but may be where she is really pregnant by another man,[23] and proof of the pregnancy of the wife by another man before the marriage will entitle to a divorce.[24]

Doubtless, the offended husband, in order to procure a divorce where his wife proves to have been pregnant when he married her, ought to be able to show that the child was not his; and simply on the ground of her fraud, as we have seen, and apart from scandalizing him before the world, proceedings for divorce or nullity are held not maintainable, even though the wife bore a bad character before marriage, or was in fact pregnant by another man, since marriage is permitted to be the gateway to repentance and virtue.[25]

§ 1549. Impotency.

Impotence as a cause of divorce means incapacity for sexual intercourse, and does not also imply incapacity to beget or bear children,[26] and incapacity for sexual intercourse is commonly a cause for divorce,[27] unless known to the other party before marriage[28] or cured before the hearing.[29]

22. Bryant v. Bryant, 171 N. C. 746, 88 S. E. 147; Schwindt v. Schwindt, 66 Pa. Super. Ct. 217; Young v. Young (Tex. Civ. App. 1910), 127 S. W. 898.

Nullity of marriage for prior pregnancy, see *ante*, § 1144.

23. Lyman v. Lyman, 90 Conn. 399, 97 A. 312; Wallace v. Wallace, 137 Ia. 37, 114 N. W. 527.

24. May v. May, 71 Kan. 317, 80 P. 567; Ritayik v. Ritayik (Mo. App.), 213 S. W. 883; Johnson v. Johnson (Tex. Civ. App.), 152 S. W. 661.

25. And see Smith v. Smith, 8 Ore. 100; Long v. Long, 77 N. C. 304.

26. Jorden v. Jorden, 93 Ill. App. 633.

27. Griffith v. Griffith, 162 Ill. 368, 44 N. E. 820 (caused by self-abuse); Grosvenor v. Grosvenor, 194 Ill. App. 652 (incurably impotent); Mutter v. Mutter, 123 Ky. 754, 97 S. W. 393, 30 Ky. Law Rep. 76 (although might be cured by surgery); S—— v. S——, 192 Mass. 194, 77 N. E. 1025, 116 Am. St. R. 240.

After delay, or usually a time limited, and upon insufficient proof, divorce on this ground is unavailable. Shafto v. Shafto, 28 N. J. Eq. 34.

28. Jorden v. Jorden, 93 Ill. App. 633.

29. Berdoit v. Berdoit, 56 Neb. 792, 77 N. W. 399.

Statutes allowing a divorce for impotency mean that the impotency must have existed at the time of the marriage,[30] and that it is incurable.[31]

§ 1550. Venereal Disease at Time of Marriage.

Concealment of the fact that one of the parties had a venereal disease on marriage is not a cause for divorce.[32]

§ 1551. Existence of Prior Marriage.

A previous existing marriage of one of the parties may by statute be made a ground of divorce,[33] but one cannot be granted a divorce who marries a woman whom he knows to be the wife of another.[34]

§ 1552. Fraud.

A divorce may be granted on the ground of fraud in procuring the marriage, as where one conceals that he is an epilectic, forbidden to marry,[35] but mere misstatement of ownership of property is not enough.[36]

One competent to marry cannot obtain a divorce on account of his own fraud in contracting it.[37]

30. Kinkaid v. Kinkaid, 256 Ill. 548, 100 N. E. 217, reversing judgment 168 Ill. App. 333; Powell v. Powell, 18 Kan. 371, 26 Am. R. 774.

In Florida divorce may be granted for causes arising after marriage rendering it impracticable for one of the parties to perform his marital duties. Hickson v. Hickson, 54 Fla. 556, 45 So. 474; Hancock v. Hancock, 55 Fla. 680, 45 So. 1020, 15 L. R. A. (N. S.) 670; Prall v. Prall, 58 Fla. 496, 50 So. 867.

31. Kincaid v. Kincaid, 256 Ill. 548, 100 N. E. 217, 168 Ill. App. 335; Hebert v. Hebert, 118 Ill. App. 448; Bunger v. Bunger, 85 Kan. 564, 117 P. 1017; Doe v. Doe, Howell, N. P. 123.

32. Koehler v. Koehler (Ark.), 209 S. W. 283.

33. Dimpfel v. Wilson, 107 Md. 329, 68 A. 561, 13 L. R. A. (N. S.) 1180.

Prior marriage as ground of annulment, see further *ante*, § 1131.

34. Tefft v. Tefft, 35 Ind. 44.

35. Gould v. Gould, 78 Conn. 242, 61 A. 604, L. R. A. (N. S.) 531.

Fraud as ground for annulment, see *ante*, §§ 1137 *et seq.*, 1158.

36. Kessler v. Kessler, 2 Cal. App. 509, 83 P. 257.

37. Watters v. Watters, 168 N. C. 411, 84 S. E. 703.

§ 1553. Duress.

Where one is forced into marriage by threats or other influences overpowering the free exercise of volition the usual remedy is by proceedings for annulment, but in many States action for divorce will lie.[38] Threats made to induce a man to marry a woman do not constitute duress where other motives induced him to marry,[39] and the mere fact that one is arrested for seduction does not show duress.[40]

38. See ante, § 1159.

39. Shepherd v. Shepherd, 174 Ky. 615, 192 S. W. 658.

40. Copeland v. Copeland, 21 S. E. 241.

CHAPTER XI.

PERSONAL INFIRMITIES ARISING AFTER MARRIAGE.

SECTION 1554. Loathsome Disease.
1555. Habitual Intemperance.
1556. When Habit Formed.
1557. Habit Must Exist When Libel Brought.
1558. Use of Drugs.
1559. Insanity.
1560. Conviction of Crime.

§ 1554. Loathsome Disease.

Statutes sometimes render the mere contracting of a loathsome disease a cause for divorce, and such a cause includes gonorrhea. It may be argued that such diseases may be sometimes innocently contracted, but the legislatures in these States seem to have taken the attitude that even though the disease was brought on without guilt, still it so alters the nature of the marriage condition that release should be granted.[41]

§ 1555. Habitual Intemperance.

In the absence of statute mere drunkenness is not a ground for divorce,[42] although it causes the husband to fail to support the wife and to justify her in leaving him,[43] but it has been the tendency of our lawmakers in recent years to make aggravated intemperance a cause of divorce. Such statutes commonly require evidence of habitual drunkenness in some form[44] for a definite

41. Bougnher v. Bougnher, 19 Ky. Law Rep. 504, 41 S. W. 26.

42. Wheeler v. Wheeler, 101 Md. 427, 61 A. 216.

43. Foote v. Foote (N. J. Eq. 1905), 61 A. 90; Wolcott v. Wolcott, 32 Ohio Cir. Ct. R. 587. See, however, McKay v. McKay, 18 B. Monr. 8.

44. Wilson v. Wilson, 128 Ark. 110, 193 S. W. 504; Marons v. Marons, 86 Ill. App. 597; Bill v. Bill, 178 Ia. 1025, 157 N. W. 158; Riley v. Riley, 13 Ky. Law Rep. (abstract) 95; Crowley v. Crowley, 19 Ky. Law Rep. 285, 40 S. W. 380; Golding v. Golding, 6 Ill. App. 602; Kissam v. Kissam, 47 N. Y. S. 270, 21 App. Div. 142 (stupor long continued).

period,[45] and are not satisfied by evidence of occasional[46] though frequent intoxication, though constant and continuous drunkenness need not be shown if drunkenness is a fixed habit.[47]

To be an habitual drunkard within the meaning of the divorce laws, a person does not have to be constantly drunk, nor necessarily incapacitated from transacting his business. It is sufficient if he has a fixed habit of frequently and repeatedly getting drunk when the opportunity presents itself, or has lost the will power to resist temptation in that respect.[48]

The habitual but moderate use of intoxicating liquors is not a cause for divorce.[49] As to habitual intemperance, however, in that sense, facts and circumstances are duly considered by the court, and frequent and regular recurrence of excessive indulgence, though not slight indiscretions, may suffice to establish the habit, without the need of expert testimony or of fine distinctions as to the inebriate's business capacity.[50]

45. Sedgwick v. Sedgwick, 50 Colo. 164, 114 P. 488; Acker v. Acker, 22 App. D. C. 353 (three years); Wesley v. Wesley, 181 Ky. 135, 204 S. W. 165 (for one year); McCarty v. McCarty, 117 Mo. App. 115, 93 S. W. 317; Glenn v. Glenn, 87 Mo. App. 377 (under the influence of intoxicating drinks is insufficient).

46. Dennis v. Dennis, 68 Conn. 186, 36 A. 34, 57 Am. St. R. 95, 34 L. R. A. 449 (once in three weeks); Meathe v. Meathe, 83 Mich. 150, 47 N. W. 109 (occasional drunkenness in a woman is not ground for divorce).

"*Habitual drunkenness*" defined. Lentz v. Lentz, 171 Mich. 509, 137 N. W. 229; Smith v. Smith, 172 Mich. 175, 137 N. W. 644; Rapp v. Rapp, 149 Mich. 218, 112 N. W. 709, 14 Det. Leg. N. 415; Donley v. Donley, 150 Mo. App. 660, 131 S. W. 356; Holm v. Holm, 44 Utah, 242, 139 P. 937.

47. O'Kane v. O'Kane, 103 Ark. 382, 147 S. W. 73; Fuller v. Fuller, 108 Ga. 256, 33 S. E. 865; De Cloedt v. De Cloedt, 24 Idaho, 277, 133 P. 664; Garrett v. Garrett, 252 Ill. 318, 96 N. E. 882, reversing judgment 160 Ill. App. 321; Walton v. Walton, 34 Kan. 195, 8 P. 110; Tarrant v. Tarrant, 156 Mo. App. 725, 137 S. W. 56; Page v. Page, 43 Wash. 293, 86 P. 582, 117 Am. St. R. 1054, 6 L. R. A. (N. S.) 914 (fixed habit is enough).

48. O'Kane v. O'Kane (Ark.), 147 S. W. 75, 40 L. R. A. (N. S.) 655.

49. Schaub v. Schaub, 117 La. 727, 42 So. 249; Bain v. Bain, 79 Neb. 711, 113 N. W. 141.

50. Wheeler v. Wheeler, 53 Ia. 511; Golding v. Golding, 6 Mo. App. 602; Mahone v. Mahone, 19 Cal. 626;

§ 1556. When Habit Formed.

The contraction of the intemperate habit after matrimony is sometimes made a prerequisite.[51]

A divorce cannot be granted for gross and confirmed habits of intoxication under a statute which requires that the habits must be acquired prior to the marriage where the husband had been a drunkard before marriage, but promised to reform, but was not cured and began his habits again a few days after marriage.[52]

§ 1557. Habit Must Exist When Libel Brought.

Where the divorce is sought on account of the habits of the libellee as of intoxication or of using drugs, the condition must exist at the time the divorce proceedings are begun,[53] and probably also at the time the divorce is actually granted.[54] So if a drug user has reformed at the time of the filing of the libel, the divorce should be refused, although the parties have separated and the libel is brought within a reasonable time after separation.[55] The divorce in such cases is not granted as a punishment, as in case of adultery, but to remedy a condition, and the State has an interest that the marriage relation shall be preserved unless the condition exists at the time the divorce is granted.

§ 1558. Use of Drugs.

The use of drugs habitually is in some States made a cause for divorce, but the habit must be shown at the time of the filing of the

Blaney v. Blaney, 126 Mass. 205; Magahay v. Magahay, 35 Mich. 210; Haskell v. Haskell, 54 Cal. 262. As to drunkenness at the marriage ceremony, see *supra*, § 1105.

51. Porritt v. Porritt, 16 Mich. 140. This is hardly a fair qualification, unless a dissolute companion was taken in marriage by one who had good opportunity for knowing that the bad habit existed.

52. McNabb v. McNabb (Ia.), 166 N. W. 457, L. R. A. 1918C, 865.

53. MacMahon v. MacMahon, 170 Ala. 338, 54 So. 165; Smithson v. Smithson (Miss.), 74 So. 149, L. R. A. 1917D, 361; Burt v. Burt, 168 Mass. 204, 46 N. E. 622.

54. Allen v. Allen, 73 Conn. 54, 46 A. 242, 49 L. R. A. 142, 84 Am. St. R. 135.

55. Smithson v. Smithson (Miss.), 74 So. 149, L. R. A. 1917D, 361.

libel, and where there was a reformation before that time this is not a cause for divorce.[56] The immoderate use of opium or chloroform, intemperance by eating or inhalation, is not generally imported by legislation authorizing divorce for intemperance, but only drinking in excess, or the immoderate use of alcoholic liquors.[57]

§ 1559. Insanity.

Insanity occurring after marriage, with or without some predisposition insufficient, of course, to invalidate the ceremony, though a misfortune which beclouds many a long conjugal union, is rarely permitted to become legal ground of divorce, notwithstanding the strong social pressure sometimes exerted to have it added to the list.[58] If the insanity was superinduced by drunkenness, or other cause of itself justifying divorce, such cause might perhaps be alleged. And facts showing great depravity of moral character in the libellee, and abandoned habits, ought not readily to be misconstrued into proof of mere insanity.[59]

A concealed hereditary taint, which breaks out after marriage, is sometimes made cause of divorce by our legislatures. Otherwise, as in the case of some physical infirmity visited upon a husband or wife, the burden of the other partner becomes often a hard one; and yet devoted kindness and forbearance not only afford the surest hope of restoring the sufferer, diseased in mind or body, to health once more, but may bring the highest blessings

56. Smithson v. Smithson, 113 Miss. 146, L. R. A. 1917D, 361, 74 So. 149, 113 Miss. 644, 74 So. 609.

57. Smith v. Smith (Del. Super.), 105 A. 833; Ring v. Ring, 112 Ga. 854, 38 S. E. 330; Rindlaub v. Rindlaub, 19 N. D. 352, 125 N. W. 479.

58. Smith v. Smith, 47 Miss. 211; Wertz v. Wertz, 43 Ia. 534; Powell v. Powell, 18 Kan. 371; Curry v. Curry, 1 Wilson (Ind.), 236. Not even cruel treatment by one of the spouses while insane can be alleged as a ground of divorce. Wertz v. Wertz, and Powell v. Powell, *supra*. In Kentucky, lunacy of three years' standing, where the result of intemperance or of a concealed hereditary taint, is made cause of divorce. Browne's Digest, Part I. Insanity and idiocy, unknown at marriage, is a specified cause elsewhere; *e.g.* Mississippi. *Ib.* Insanity at the time of marriage is, of course, cause for nullity. *Supra*, §§ 1102, 1103.

59. Hill v. Hill, 27 N. J. Eq. 214.

to the patient spouse. The constancy of husband and wife to one another in sickness or health, in accordance with the marriage vow, is the crown of matrimony, and rebellious passion is too mean a flame to burn by its side.

Insanity is not a ground for divorce unless made so by statute,[60] and divorce may be prohibited where either party is insane.[61]

§ 1560. Conviction of Crime.

Conviction of felonious crime, with perhaps actual sentence besides to prison for a considerable length of time, becomes a cause of divorce; partly from the consideration that something like desertion ensues, but more, we think, because of the public indignity sustained by the innocent spouse in consequence, who is forced to endure the ignominy of partner to a convicted felon. Were separation the only ground to allege, it might be argued that if a prisoner were pardoned out before the expiration of his sentence, he might properly resist a divorce, but as the law stands he cannot; for the right of divorce becomes complete upon the conviction and sentence.[62] Divorce acts vary in language as to this provision; and we need hardly add that if imprisonment "in the State's prison" be the offence named, a conviction and punishment by sentence elsewhere cannot be relied upon.[63]

Statutes often make conviction after marriage of an infamous crime[64]

60. Baughman v. Baughman, 34 Pa. Super. Ct. 271; Johnston v. Johnston, 34 Pa. Super. Ct. 606.

61. Daugherty v. Daugherty (Tex. Civ. App.), 198 S. W. 985.

62. Marrying another man in form after the husband's sentence cannot be alleged as adultery on the wife's part by the husband. Handy v. Handy, 124 Mass. 394.

63. See Klutts v. Klutts, 5 Sneed, 423; Martin v. Martin, 47 N. H. 52. Final conviction is here essential to establish the offence. Vinsant v. Vinsant, 49 Ia. 639. To this, in Louisiana, is added the offence of fleeing from justice when charged with an infamous offence. And in Virginia, conviction of an infamous offence before marriage, unknown to the other party. Browne's Digest of Divorce, Part I.

64. Holloway v. Holloway, 126 Ga. 459, 55 S. E. 191, 7 L. R. A. (N. S.) 272 (voluntary manslaughter involves "moral turpitude"); Suther-

or felony a cause for divorce.[65]

Where the statute prescribes the length of time of the sentence, this is reckoned as the maximum without regard for what may be taken off for good conduct,[66] and where one is sentenced for different crimes each stands by itself and the sum of the sentences cannot be added together to make up the statutory period.[67]

A pardon does not affect the conviction as a cause for divorce,[68] and one is "imprisoned" under the statutes where convicted and sentenced and entered and numbered in the penitentiary and then pardoned.[69]

A statute making sentence to imprisonment a cause for divorce is not limited to sentences imposed after the passage of the statute, but it is enough that the sentence was imposed after the marriage. The court takes the view that as divorce statutes concern the good order of society there is no reason why statutes creating causes for divorce should not have a retroactive effect unless the statute expressly indicates that it is to act prospectively only.[70]

lin v. Sutherlin, 27 Ind. App. 301, 61 N. E. 206 (manslaughter included under murder); Unsoeld v. Unsoeld, 216 Mass. 594, 104 N. E. 462; Dion v. Dion, 92 Minn. 278, 100 N. W. 4, rehearing denied 100 N. W. 1101 (sentence to State reformatory insufficient); Luper v. Luper (Ore. 1908), 96 P. 1099 (only when conviction final by affirmance on appeal or failure to take an appeal).

65. Hartwig v. Hartwig, 160 Mo. App. 284, 142 S. W. 797.

66. Oliver v. Oliver, 169 Mass. 592, 48 N. E. 843; Sargood v. Sargood, 77 Vt. 498, 61 A. 472.

67. Kauffman v. Kauffman, 24 Pa. Super. St. 437.

68. Holloway v. Holloway, 126 Ga. 459, 55 S. E. 191, 7 L. R. A. (N. S.) 272; Wood v. Wood, 135 Ga. 385, 69 S. E. 549.

69. Klasner v. Klasner (N. M.), 170 P. 745.

70. Long v. Long (Minn.), 160 N. W. 687, L. R. A. 1917C, 159.

CHAPTER XII.

ADULTERY.

SECTION 1561. History.
1562. What Constitutes.
1563. Adultery as Habitual Illicit Cohabitation.
1564. Adultery a Ground for Divorce Only When so Provided by Statute.
1565. Whether Equally a Cause of Divorce to Either Spouse.
1566. As Crime.
1567. Evidence.
1568. Corroboration Required.

§ 1561. History.

The Christian rule permitted the Jewish husband to put away his wife for adultery in preference to all others, if not to the exclusion of all others. And, adopting that principle, most English and American statutes now in force pronounce adultery cause for the fullest possible divorce, on an injured husband's behalf, which the law recognizes, namely, from bond of matrimony. Prior, however, in England, to 1858, when the Divorce Act took effect, the ecclesiastical courts took jurisdiction of such cases; and their practice, as already seen,[71] was for centuries, where the decree sought was not nullity, as for cause anterior to marriage, but divorce on cause arising subsequent, to pronounce nothing more than a sentence of separation from bed and board. These courts were influenced, doubtless, by the ancient Church dogma that marriage is a sacrament; and hence Protestants rich and powerful had recourse to Parliament for a full bill of divorce, just as Catholic sovereigns had sought dispensations from the Pope.

§ 1562. What Constitutes.

Adultery is a plain offence, and quite universally admitted by legislation to justify the dissolution of a marriage, since the crime

71. *Supra*, § 1470.

itself involves conjugal unfaithfulness at the most vital part of the marital relation. By adultery, in the present connection, we mean, of course, the voluntary sexual intercourse of either married party with someone, married or single, of the opposite sex, other than the offender's own spouse.[72]

That adultery which justifies divorce must have been voluntary, involving the criminal intent. Where the spouse was ravished, on the one hand, or, on the other, held voluntary intercourse with one erroneously believed to be the conjugal partner, there is constituted no cause for a divorce; nor is one's wife to be set aside as an adulteress who married again, reasonably, but mistakenly, supposing her first husband dead, or herself divorced from him, and whose intercourse continued with the second husband until the bigamous marriage was annulled, and no longer.[73] Carnal intercourse held with a third person while insane cannot afford ground of divorce against a spouse for adultery, according to the weightier authorities.[74] But one's re-marriage under pretences known to be false cannot shield the guilty offender; nor is religious belief in the moral right of polygamy or concubinage to be alleged in defence of a libel for the cause of adultery.[75]

So one may obtain a divorce on the ground of adultery where the spouse obtains a void decree of divorce and thereafter marries and lives with another.[76]

Where a husband commits rape on another woman this constitutes adultery on his part, as his act was voluntary.[77]

72. Bouvier Dict. "Adultery."

73. Ayl. Parer, 226; Valleau v. Valleau, 6 Paige, 207.

74. Broadstreet v. Broadstreet, 7 Mass. 474; Nichols v. Nichols, 31 Vt. 328; Wray v. Wray, 19 Ala. 522. But see Matchin v. Matchin, 6 Barr, 332.

75. D'Aguilar v. D'Aguilar, 1 Hag. Ec. 773.

76. (1910) Ackerman v. Ackerman, 93 N. E. 192, 200 N. Y. 72, affirming judgment (1908) 108 N. Y. S. 534, 123 App. Div. 750; Winston v. Winston, 54 N. Y. S. 298, 59 N. E. 273, 165 N. Y. 553, 3 App. Div. 460, judgment affirmed (1901) 31 Civ. Proc. R. 383.

77. Johnson v. Johnson, 78 N. J. Eq. 507, 80 A. 119.

§ 1563. Adultery as Habitual Illicit Cohabitation.

In some States adultery implies habitual living in illicit relationship, and a single act is not enough to entitle to a divorce.[78] But the crime of living together in "open and notorious adultery" may be committed if the parties so lived together for a single day, and in a criminal prosecution it is enough to allege the commission of the crime on a certain day without a continuendo.[79] The crime is committed by the cohabitation openly of a man and woman who are not married, although they claimed to be married and kept secret the fact that they were not married.[80]

§ 1564. Adultery a Ground for Divorce Only When so Provided by Statute.

Adultery is not a ground for divorce unless made so by statute.[81]

§ 1565. Whether Equally a Cause of Divorce to Either Spouse.

A woman's chastity is of more concern to one's self, to society, and to a sound posterity, than a man's; her carnal appetite is less violent; nature sets a stronger seal upon her loose indulgence of passion; and when she yields guiltily to man's solicitation, so delicate is her organization, that the stain left upon her moral nature is deeper. Her body is the temple of posterity, and an illegitimate conception her lasting pollution. If a wife be child-bearing, she is disabled for long intervals from gratifying her husband's appetite, though that appetite should recur in regular course. All this might indicate that nature enjoins continence more rigidly upon

78. Baker v. Baker, 136 Ky. 617, 124 S. W. 866; Kerby v. Kerby (Ky. 1908), 112 S. W. 927; Prendergast v. Prendergast, 146 N. C. 225, 59 S. E. 692; Morris v. Morris, 20 Ala. 168; Hansley v. Hansley, 10 Ire. 506. In Louisiana the offence is that of keeping his concubine in the common dwelling, or openly and publicly elsewhere.

79. Spencer v. State (Okla. Crim. R.), 169 P. 270, L. R. A. 1918F, 592.

80. Spencer v. State (Okla. Crim. R.), 169 P. 270, L. R. A. 1918F, 592; *contra*, People v. Salmon, 148 Cal. 303, 83 P. 42.

81. Stewart v. Stewart, 105 Md. 297, 66 A. 16. See Hubbard v. Hubbard, 127 Md. 617, 96 A. 860 (adultery is ground for divorce and not for separation).

the one conjugal partner than the other, instead of binding them alike to vigilant regulation of their passions. And hence the ruder codes punished the adultery of the wife, but not that of the husband.[82] So far as relates to a wife living in the usual domestic seclusion, guilty love must generally precede her adultery, her mind and heart becoming depraved before she yields a sinful assent; but with a husband this does not necessarily follow, since opportunity and the sexual desire operate ardently, quickly, and recklessly to some present sensual gratification.

In our enlightened community, however, husband and wife may be treated as on an equal plane in this respect, woman herself being strenuously desirous to have it so; hence American divorce statutes do not, for the most part, accord to the innocent spouse of one sex relief for conjugal unfaithfulness which they would deny reciprocally to the other.[83] British inclination is different; for the usual parliamentary practice was to withhold the special act of divorce where the wife petitioned against her adulterous husband, but to grant it where the guilt was reversed;[84] and in England to-day adultery by the husband is not a cause for divorce, but only for judicial separation, and to obtain a divorce the wife must also prove either cruelty or desertion.[85]

Under the common-law idea of adultery an unmarried man who has intercourse with a married woman is guilty of adultery, as it was based on the possibility of introducing spurious issue and to adulterate the issue of an innocent husband and turn the inheritance away from his own blood to that of a stranger.[86] There is

82. See *ante*, § 1470.

83. The language of the statute must serve for the criterion in each State. Living separately in adultery is, or was, the offence, as defined in North Carolina and Louisiana, for which divorce could be granted. Long v. Long, 2 Hawks. 189; Adams v. Hurst, 9 La. 243. This contemplates a separation without the fault of the libellant; thus, the adultery of a wife, committed by her after a separation caused by the husband's wrong, will not avail him to dissolve the bonds of matrimony. Tew v. Tew, 80 N. C. 316.

84. *Supra*, § 1470.

85. Balcombe v. Balcombe (1908), P. D. 176.

86. State v. Bigelow (Vt.), 92 A. 978, L. R. A. 1915D, 438.

some authority, however, for the view that an unmarried man having intercourse with a married woman is not guilty of the crime of adultery. These courts have most of them adopted the ecclesiastical view of adultery as being a breach of the marriage vows of the defendant, or the decision is based on the wording of the statute.[87]

§ 1566. As Crime.

This is an offence not by itself indictable at common law, but left rather to the ecclesiastical or matrimonial courts for cognizance and discipline.[88] In the United States, however, it is punishable by fine and imprisonment under local statutes, which usually define the offence in addition. Some of these local codes incline to treating criminal proceedings for adultery, like those generally in the divorce courts, as matter for discipline at conjugal discretion, so that prosecution for adultery is forbidden except upon the complaint of the injured spouse.[89]

§ 1567. Evidence.

Two elements are necessary to prove adultery, opportunity to commit the crime and an adulterous disposition. It is not necessary from the nature of things to prove the actual coition or even that the parties were seen in bed together, as the law presumes, human nature being what it is, when opportunity is coupled with a lascivious disposition, that the natural human passions are gratified.

But the adulterous disposition is an important element which must always be shown, either by acts of improper familiarity, by language or any acts indicating the nature of the relationship. "The mere association of a man and woman, however frequent

87. Buchanan v. State, 55 Ala. 154; Respublica v. Roberts, 1 Yeates, 6; Comm. v. Lafferty, 6 Gratt. 672; Hunter v. United States, 1 Pinney (Wis.), 91, 39 Am. Dec. 277; *Re* Cooper, 162 Cal. 81, 121 P. 318.

88. 4 Bl. Com. 65; Mordaunt v. Moncreiffe, L. R. 2 H. L. Sc. 374.

89. People v. Knapp, 42 Mich. 267.

and extended, is not of itself . . . sufficient to prove the crime of adultery. A man and woman may be brought daily together for the transaction of business, they may live in the same house and be frequently seen in each other's company, but these facts are not enough to show adultery, even where it may be conceded opportunity exists to commit the offence. The offence is not established under these conditions unless there is some evidence of speech or conduct indicating an adulterous disposition." So where a physician separated from his wife and gave up his practice, and bought a farm, where he lived with his minor son and a woman and her son, and they managed the farm together, there is no evidence of adultery where no evidence appears of improper familiarity or other suspicious circumstances.[90]

Adultery of the wife should be proved by some clear, direct evidence, and it is insufficient to show that she went to walk alone with a man on one occasion or that she kept company with lewd women. Direct and positive evidence of the criminal act is not required, but the circumstantial evidence must establish it clearly.[91]

The libellant in a divorce case need not prove adultery by evidence "which is clear, cogent and convincing," but it is sufficient if it is shown by the preponderance of the evidence, as in the case of facts in other civil cases.[92]

Reputation.— To prove a cause for divorce it is not permissible to put in evidence for the plaintiff the general reputation of the defendant for chastity.[93] Some courts hold that one charged with adultery may put her reputation for chastity in evidence just as in criminal cases the defendant may put in character evidence, but it is in perfect accord with this doctrine to deny the complainant the right to attack the defendant's character through general reputation for lewdness and unchastity. There are a number of cases deciding that it is permissible to prove the character of a

90. White v. Ely, 234 Mass. 221.

91. Huff v. Huff (W. Va.), 80 S. E. 846, 51 L. R. A. (N. S.) 282.

92. Ellett v. Ellett, 157 N. C. 161, 72 S. E. 861, 39 L. R. A. (N. S.) 1135.

93. Washburn v. Washburn, 5 N. H. 195.

woman with whom a husband charged with adultery associates or visits, or the reputation of a house visited by the wife charged with this ground for divorce, but in this class of cases the character offered is that of a third person, not a party to the cause, and it may be material as bearing upon the guilt or innocence of the party charged as showing the probable purpose of the association or visit.[94]

§ 1568. Corroboration Required.

It is settled in many States that a divorce cannot be granted on the uncorroborated evidence of the petitioner,[95] and it is also settled in many States that the uncorroborated confession of the respondent is insufficient foundation for divorce;[96] and it is held in a recent case that the confession and the petitioner's testimony together are insufficient, on the theory that the parties ought not to be allowed together to present a case for divorce on account of the danger of collusion,[97] but it has been held that if the confession is made in open court there is not so much danger of collusion, and then the petitioner's testimony is sufficient corroboration.[98]

A confession of a wife of unchastity as a basis of an action for annulment should be corroborated by independent facts and circumstances, and this does not appear in the case of a written confession given by the wife in a moment of anger when only the husband was present that her child is not his, where she afterwards makes repeated efforts to have him support it, claiming it is his. This confession amounts to nothing more than the testimony of the wife, had she taken the stand, which is insufficient.[99]

94. Land v. State (Fla.), 71 So. 279, L. R. A. 1916E, 760.

95. Reid v. Reid, 112 Cal. 274, 44 P. 564; Grover v. Grover, 63 N. J. Eq. 771, 50 A. 1051; *contra*, Baker v. Baker, 195 Pa. St. 407, 46 A. 96.

96. Kloman v. Kloman, 62 N. J. Eq. 153, 49 A. 810; Betts v. Betts, 1 Johns. Ch. (N. Y.) 197.

97. Garrett v. Garrett (N. J.), 98 A. 848.

98. Smith v. Smith, 119 Cal. 183, 48 P. 730; Hague v. Hague (N. J.), 95 A. 192.

99. Cogswell v. Cogswell (D. C.), 47 Wash. Law Rep. 364.

CHAPTER XIII.

CRUELTY: WHAT CONSTITUTES: PHYSICAL AND MENTAL.

SECTION 1569. Cruelty; What Sort Justifies Divorce.
1570. Character of Parties Considered in Determining What Constitutes Cruelty.
1571. Combination of Various Acts.
1572. Necessity of Continuance of Acts.
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1574. Use of Moderate Force Necessary to Dominate Wife.
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1576. Physical Injury and Mental Suffering; English Views.
1577. Necessity of Physical Injury. Mental Distress; American Views.

§ 1569. Cruelty; What Sort Justifies Divorce.

Legal cruelty is more readily expounded by negative than affirmative language. Legislative enactments, which in practice should always be resorted to according to the jurisdiction, employ various phrases not always equivalent, such as the following: "cruel, inhuman, and barbarous treatment;" "extreme cruelty;" "cruel and inhuman treatment;" such conduct on the husband's part towards his wife as renders it "unsafe and improper for her to cohabit with him;" "intolerable cruelty;" "extreme and repeated cruelty;" "cruelty of treatment."

There are statutes in certain of the United States which come short of the extremity of cruelty altogether,[1] by justifying divorce for "excesses," "outrages," "indignities to the wife's person," "intolerable indignities," etc., such as to render living together insupportable and life burdensome. But it is perceived that this cause of divorce is designed regularly for the vindication of the weaker party, usually a wife, whose wrong from her husband's

1. See also the North Carolina expression in Miller v. Miller, 78 N. C. 102; Miles v. Miles, 76 Pa. St. 357; and miscellaneous causes of divorce, *post*.

cruelty may be found greater, in the average of cases, than from his silent infidelities.

The English ecclesiastical courts long recognized cruelty, or *sævitia,* the offence our modern divorce acts so amplify and vary in phrase, as ground for pronouncing a sentence of divorce from bed and board. In general, this is the statute offence, whatever the difference of phrase, and whether the divorce be partial or complete. "The complaint," says Lord Stowell, "generally proceeds from the wife, as the weaker person; but it may come from the man, and has so done in several cases." [2]

What, then, is legal cruelty? Lord Stowell, in the leading case of *Evans* v. *Evans,* while declining to assert a positive definition, laid down the limitations of the rule with great strictness, and, at the same time, very justly. "The causes," he observed, "must be great and weighty, and such as show an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary both in commencement and in obligation; but what falls short of this is with great caution to be admitted." And, as he further stated, the danger of life, limb, or health to the petitioner was usually alleged as the ground for judicial interference; a reasonable apprehension of bodily hurt being the indispensable condition.[3]

We may consider, then, that to entitle the wife to a divorce from her husband, on the ground of cruelty, there must appear by the proof either actual violence on his part, or such other misbehavior as to fill her with reasonable apprehension of bodily injury. And, in general, it should be stated that wherever the conduct of one spouse to the other is such that the latter cannot continue cohabitation without reasonable ground for fearing such bodily harm from the former as seriously to obstruct the exercise of marital duties,

2. Waring v. Waring, 2 Phillim. 132.

3. Evans v. Evans, 1 Hag. Con. 35.

or render the conjugal state unendurable, there legal cruelty exists, and cause for divorce. From this point of view, violence actually committed, or violence threatened, are treated as alike reprehensible.[4] Many of the latest cases rest upon the simple requirement that there be reasonable ground, under the circumstances, for the complaining party to believe that the continuance of marital intercourse would be attended with danger to life or health.[5]

"Cruel and abusive treatment" is a legislative expression which is found superadded to "extreme cruelty," but with what peculiar significance, beyond the *sævitia* we have discussed, it would be difficult to say.[6]

Extreme cruelty is "personal violence intentionally and wantonly inflicted so serious as to endanger life, limb or health, or create reasonable apprehension of such danger."[7]

§ 1570. Character of Parties Considered in Determining What Constitutes Cruelty.

In determining what constitutes cruelty regard must be paid to the physical and mental condition of the parties and their character and social station.[8]

The age, temperament, and disposition of the two spouses, and to some extent their rank and condition, ought fairly to be esti-

4. Evans v. Evans, 1 Hag. Con. 35; Lockwood v. Lockwood, 2 Curt. Ec. 281; Westmeath v. Westmeath, 4 Eng. Ec. 238; Odom v. Odom, 36 Ga. 286; Close v. Close, 25 N. J. Eq. 526; Ruckman v. Ruckman, 58 How. (N. Y.) Pr. 278; Latham v. Latham, 30 Gratt. 307.

5. The rule is thus stated in New Jersey. Where the husband has been guilty, or there is reasonable ground to apprehend that he will be guilty, of any actual violence which will endanger the safety or health of the wife, or where he has inflicted upon her any physical injury, accompanied by such persistent exhibition of ill-feeling and opprobrious epithets as will endanger her health, or render her life one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife, the decree of separation should be pronounced. Close v. Close, 25 N. J. Eq. 526.

6. Cowles v. Cowles, 112 Mass. 208.

7. Holyoke Case, 78 Me. 410.

8. Day v. Day, 5 Alaska, 584.

mated, with the view of determining whether the reasonable apprehension of bodily harm was present in the case. Thus, in injuries which accomplish the physical hurt of a wife or husband through the infliction of mental pain and anguish, a spouse who does not appear of such sensitive nature and refined feelings that his or her health would be reasonably endangered by the conjugal misbehavior in question, cannot procure a divorce as for cruelty.[9]

Where the divorce is sought on the ground of the use of rough language much must depend on the character of the parties and their degree of cultivation,[10] and there is some authority that the continual use of vulgar and indecent language to one of refinement and delicacy is ground for divorce.[11]

§ 1571. Combination of Various Acts.

Cruelty in law being not fixed and definite, but so dependent on all the circumstances of each case, the court must examine all the particulars of each set of matrimonial troubles presented, and a combination of various kinds of cruelty not in themselves a cause for divorce may together be a cause for divorce.[12]

9. Bennett v. Bennett, 24 Mich. 482. If the woman be aged or pregnant, or specially disabled, physical violence by the husband is an aggravated offence. D'Aguilar v. D'Aguilar, 1 Hag. Ec. 773; Westmeath v. Westmeath, 4 Eng. Ec. 238; Beyer v. Beyer, 50 Wis. 254. *Semble* the rank and condition of the parties cannot justify a disregard of the decencies of life. Whispell v. Whispell, 4 Barb. 217.

10. Zweig v. Zweig, 46 Ind. App. 594, 93 N. E. 234 (refusing to speak to wife or to visit neighbors with her). Emery v. Emery, 181 Mich. 146, 147 N. W. 452; Shuster v. Shuster, 3 Neb. (Unof.) 610, 92 N. W. 203; Mosher v. Mosher, 16 N. D. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820 (profanity and obscene language by wife).

That complainant's husband was untidy in his habits and occasionally played cards for small stakes, held insufficient to constitute extreme cruelty. Cunningham v. Cunningham, 187 Mich. 68, 153 N. W. 8.

11. Bennett v. Bennett, 24 Mich. 482; Warner v. Warner, 54 Mich. 492, 20 N. W. 557; Fitzpatrick v. Fitzpatrick, 47 N. Y. S. 737, 21 Misc. 378.

12. Donaldson v. Donaldson (Idaho), 170 P. 94 (if cause grievous mental suffering); Smith v. Smith, 181 Ky. 55, 203 S. W. 884 (overworking wife, striking her, refusal to buy sufficient clothing and charging her with running a whorehouse); McCarty v. Stelly (La.), 82 So. 411 (requiring

§ 1572. Necessity of Continuance of Acts.

A single gross instance of cruelty to the person may justify divorce, especially if the circumstances indicate that the victim is in further bodily danger; or if, indeed, that act alone betrayed a cruel disposition in the offending spouse (since this may well excite apprehension), or perhaps if, as some cases are content to assert, the act itself endangers the victim's life or health.[13] But the provocation as well as the severity of the act should be considered, and cautious courts disincline to punish a single act so summarily where there was exasperation, or where the violence was slight, and when a repetition of the offense is not likely to occur unless unfairly provoked, and hence further cohabitation may not be thought unsafe.[14]

Hence it is a general rule that a single act of violence is not cruelty sufficient as a cause for divorce,[15] nor are isolated instances of cruelty repeated at long intervals.[16] That no reasonable apprehension of danger was entertained or existed at all may well be inferred when such single act is set up years after it was per-

wife to sleep on floor, etc.); Tuffelmire v. Tuffelmire, 192 Mich. 147, 158 N. W. 178; Jones v. Jones, 173 N. C. 279, 91 S. E. 960; Beebe v. Beebe, 160 N. Y. S. 967, 174 App. Div. 408 (husband telling wife in childbirth of his love for another and then basing lunacy proceedings on condition thus excited); Morris v. Morris, 177 N. Y. S. 600 (wife abusing husband and telling him she loved another with whom she frequently went, etc.); Belmont v. Belmont, 82 Ore. 612, 162 P. 830; Mamaux v. Mamaux, 64 Pa. Super. Ct. 131 (physical violence and bringing of false charges against him); Doe v. Doe, 48 Utah, 200, 158 P. 781. See Robertson v. Robertson (Okla.), 176 P. 387.

13. Mahone v. Mahone, 19 Cal. 626; Beyer v. Beyer, 50 Wis. 254. But "extreme and repeated cruelty" is the language of the Illinois statute. Harman v. Harman, 16 Ill. 85; Embree v. Embree, 53 Ill. 394.

14. Henderson v. Henderson, 88 Ill. 248; Coles v. Coles, 32 N. J. Eq. 547; Hoshall v. Hoshall, 51 Md. 72; Barrere v. Barrere, 4 Johns. Ch. 187; Richards v. Richards, 1 Grant, 389.

15. Werres v. Werres, 102 Ill. App. 360.

Remarriage. Hall v. Hall, 148 Ill. App. 630.

Cruelty. Meyer v. Meyer, 151 N. W. 74; Calichio v. Calichio, 96 A. 658; Hagood v. Hagood (Tenn. Ch. App. 1897), 48 S. W. 122; *contra*, Veal v. Veal, 140 La. 879, 74 So. 181.

16. Primeaux v. Comeaux, 139 La. 549, 71 So. 845.

formed, or disconnected acts stretching over a long interval of uninterrupted marriage intercourse are made the ground of later proceedings for a divorce by a dissatisfied spouse.[17] As against repeated or habitual acts of personal violence, however, redress sought within a reasonable time will undoubtedly be granted.

It is perceived that personal violence is not regarded as an indispensable element in the latest cases.[18]

§ 1573. Personal Violence.

Habitual personal violence constitutes legal cruelty;[19] and violence of any kind may be aggravated by being so manifested before others as to degrade and shame the spouse injured.[20] Whipping a wife and declaring an intention to persist in it is legal cruelty;[21] and so would be spitting upon her, pushing and dragging her about the room and slapping her; chastisement altogether unjustifiable, and showing a disposition dangerous to the conjugal continuance.[22]

Acts of violence[23] or severe blows will always constitute evidence of cruelty,[24] especially when accompanied by threatening conduct

17. Horne v. Horne, 1 Tenn. Ch. 259; Henderson v. Henderson, 88 Ill. 248.

18. Wheeler v. Wheeler, 53 Ia. 511; Black v. Black, 30 N. J. Eq. 215. And see Reeves v. Reeves, 3 Swab. & T. 139; Lauber v. Mast, 15 La. Ann. 593.

19. Johns v. Johns, 57 Miss. 530.

20. See Lord Penzance in Milner v. Milner, 4 Swab. & T. 240.

21. Taylor v. Taylor, 76 N. C. 433. This case is under the peculiar statute as to "indignities," but it applies to cruelty generally.

22. Saunders v. Saunders, 1 Rob. Ec. 549.

23. Trapp v. Trapp, 20 Ky. Law. Rep. 335, 46 S. W. 213; Harl v. Harl, 24 Ky. Law Rep 2163, 73 S. W. 756; Wall v. Wall (Mich.), 162 N. W. 1001; Stark v. Stark, 129 Mich. 153, 8 Det. Leg. N. 886; Westphal v. Westphal, 81 Minn. 242, 83 N. W. 988; Strahorn v. Strahorn, 82 Mo. App. 580; McBride v. McBride, 5 N. Y. Supp. 388; Ryan v. Ryan, 30 Ore. 226, 47 P. 101; O'Brien v. O'Brien, 36 Ore. 92, 58 P. 892; Owens v. Owens, 96 Va. 191, 31 S. E. 72.

24. Luick v. Luick, 132 Ia. 302, 109 N. W. 783; Millet v. Millet (La.), 81 So. 400; Sharp v. Sharp, 105 Md. 581, 66 A. 463; Utley v. Utley, 155 Mich. 258, 118 N. W. 932, 15 Det. Leg. N. 984; Germaine v. Germaine (Mich.), 171 N. W. 377; Jobb v. Jobb (Mich.), 165 N. W. 672 (hitting wife in stomach, making her ill); Tietken v.

such as to cause reasonable fear of serious injury.[25] But a slight slap or push not threatening bodily harm,[26] or striking a wife in sudden quarrel may not be such a deliberate act as to cause a divorce for cruelty;[27] and the fact that the quarrel was brought on in part by the interference of third parties is no justification for personal violence on wife.[28]

§ 1574. Use of Moderate Force Nceessary to Dominate Wife.

And moderate force, when necessary to enforce the husband's right to command, is not cruelty;[29] where a physical contest ensues for possession of a child,[30] or where the husband uses necessary force in defending his right to chastise the child, this is not cruelty justifying a divorce.[31]

§ 1575. Power to Protect from Violence.

Where it appears that the libellant has the power to protect him-

Tietken, 60 Neb. 138, 82 N. W. 367; Boyle v. Boyle, 75 N. J. Eq. 293, 72 A. 1118 (wife a child of 16); Boyle v. Boyle (N. J. Ch. 1907), 67 A. 690; Itzkowitz v. Itzkowitz, 53 N. Y. S. 356, 33 App. Div. 244; Clark v. Clark (Okla.), 154 P. 1142 (whipping wife is cruelty); Decker v. Decker, 56 Ore. 381, 108 P. 777; Folkenberg v. Folkenberg, 58 Ore. 267, 114 P. 99; Rosenthal v. Rosenthal, 61 Pa. Super. Ct. 104; Sonricker v. Sonricker, 39 Pa. Super. Ct. 652; Welfer v. Welfer, 54 Pa. Super. Ct. 215; Young v. Young (Tenn. Ch. App. 1900), 57 S. W. 438; Briggs v. Briggs, 56 Wash. 580, 106 P. 126.

25. Davenport v. Davenport, 106 Va. 736, 56 S. E. 562; Lord v. Lord, 80 W. Va. 547, 92 S. E. 749.

The intention and ability of the accused spouse to inflict the extreme cruelty alleged, and the susceptibility and provocative disposition of the complaining spouse, and the demeanor of the parties at the trial, are matters proper to be considered. Wells v. Wells, 39 Okla. 765, 136 P. 738.

26. Finley v. Finley, 9 Dana, 52.

27. Hockerston v. Hockerston (Cal. App.), 182 P. 325.

28. Unzicker v. Unzicker, 101 Neb. 837, 166 N. W. 241.

29. Jones v. Jones, 66 So. 4; Darrow v. Darrow, 122 Ark. 346, 183 S. W. 746 (bruising arm and drawing knife); Bain v. Bain, 79 Neb. 711, 113 N. W. 141; Barber v. Barber, 153 N. Y. S. 256, 168 App. Div. 212.

30. Mills v. Mills, 47 Ore. 246, 83 P. 390; Galigher v. Galigher, 49 Ore. 155, 89 P. 146.

31. Loring v. Loring, 17 Tex. Civ. App. 95, 42 S. W. 642; Cunningham v. Cunningham, 22 Tex. Civ. App. 6, 53 S. W. 75.

self against violence, a divorce for cruelty will not usually be granted.[32]

But there are certain kinds of cruelty against which no man, however able-bodied, can properly defend himself,[33] and the physical ability of the male spouse to defend himself ought to furnish no decisive obstruction to his right of relief against woman's cruelty. Many men scruple to lay violent hands on a woman, or to contend in such unseemly quarrels; and they would sooner submit to a blow. A sick or crippled husband, or even an able-bodied husband, may be physically weaker, moreover, than his wife in such instances. And once more, the use of poison, loaded firearms, and the like, puts physical advantage aside; so that the reckless wife, strong of nerve, may well overpower the bravest and most vigorous of husbands, when the latter is prudent enough to appreciate the danger.[34]

The husband's prayer for judicial separation was allowed on account of his wife's cruelty in an English case decided by Lord Penzance in 1864. The wife had habitually shown great and unrestrained violence: irritability on all, even the slightest, occasions; her burst of unprovoked ill temper, and the abuse she heaped constantly upon her husband, were fully proved. But she went further; and "emboldened by a policy of passive resistance which he had adopted from religious motives, she sought to rule his conduct by threats of personal attack; and finally she thrust herself before him on the steps of a public chapel, the service of which he was attending against her will; assailed him with abuse and blows, and, as the sole refuge from an unseemly struggle, drove him with ignominy home."[35] The excitement and nervous shock

32. Garrett v. Garrett, 252 Ill. 318, 96 N. E. 882, reversing judgment 160 Ill. App. 321; Severns v. Severns, 107 Ill. App. 141; Saunders v. Saunders, 82 N. J. Eq. 491, 89 A. 518; Jones v. Jones, 44 Ore. 586, 77 P. 134.

33. Evans v. Evans, 1 Hag. Con. 35.

34. In Beebe v. Beebe, 10 Ia. 133, a husband had just apprehension that his wife meant to poison him.

35. Prichard v. Prichard, 3 Swab. & T. 523.

threw the husband into a fit, and caused him great mental and bodily prostration.

Justly, therefore, cruelty is permitted to be a cause of divorce on behalf of either husband or wife, under the law which prevails in England and most parts of the United States. But under some of our local statutes, the wife is specified as the only spouse to whom such complaints of marital misconduct are available for dissolving the union.[36]

§ 1576. Physical Injury and Mental Suffering; English Views.

It may be supposed that with the modern denial of the husband's right of discipline, and the growing refinement of manners and equality of the sexes, not to add the readiness of the courts, so much greater now than formerly, to part unhappy couples, the definition shifts somewhat to accommodate the times. And hence injuries inflicted upon a wife, such as cause mental, more immediately than physical, suffering, are considered cause for divorce. The sensitive organization of a weaker spouse always deserves consideration where the stronger brutally abused his power; yet some courts are found more considerate, or perhaps more compliant, in this respect than others, to compare English and American cases together. The older and more conservative doctrine on this point is clearly announced by Lord Stowell with great beauty of language.

"What merely wounds the mental feelings is in few cases to be admitted, where not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offences in the marriage state, undoubtedly; not innocent surely in any state of life; but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties,

36. *Ib.*

for it may exist on one side as well as the other, the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence."[37]

This opinion was pronounced in 1790, since which time public views have changed upon the necessity that the aggrieved party should exercise conjugal forbearance when wilfully persecuted. The above quotation may still stand perhaps as sound law; but not so clearly what Lord Stowell further proceeded to state as concerned the infliction of mental suffering. An apprehension of physical danger he insisted upon as still the criterion; an apprehension reasonable of itself and not "an apprehension arising merely from an exquisite and diseased sensibility of the mind." This, perhaps, we may admit, but not readily what follows. "Petty vexations applied to such a constitution of mind," he continued, "may certainly in time wear out the animal machine, but still they are not cases of legal relief; people must relieve themselves as well as they can by prudent resistance, by calling in the succors of religion and the consolation of friends; but the aid of courts is not to be resorted to in such cases with any effect."[38]

From the bias, more than the language, here employed, American, and probably English, courts of the present day are found to practically dissent. For while that which merely wounds the feelings and produces mental suffering falls short of legal cruelty, wilful vexations, apart from physical menace or injury, which prey upon the health of a delicate spouse, and threaten bodily harm by endangering the bodily health and unfitting for the duties of spouse, are usually treated at this day, especially if repeated and habitual after the harm it does is discovered, as amounting to legal cruelty such as to justify divorce on that ground.[39]

37. Evans v. Evans, 1 Hag. Con. 35; 4 Eng. Ec. 310, 311.

38. Evans v. Evans, 1 Hag. Con. 35; 4 Eng. Ec. 310, 311.

39. Staples, J., in a Virginia case, lays down the definition of cruelty with becoming caution, yet with such admissions. Austerity, rudeness, petulance, what merely wounds the feelings, without being accompanied by

What must be the extent of the injury, or what particular acts should excite a reasonable apprehension of bodily harm, the circumstances of each case, which vary somewhat with the surroundings of life and the relations of the pair to society, should determine.

§ 1577. Necessity of Physical Injury; Mental Distress; American Views.

Acts causing bodily injury and grievous mental suffering, making cohabitation dangerous, will everywhere be held to constitute cruelty.[40] On the whole, as to the harm which justifies the present divorce, the most intelligent cases estimate it from the point of physical, not mental, hurt. Hence the mental infliction proves material when resulting in bodily hurt; so that a reasonable apprehension of losing one's bodily health and strength may be said to result from the conjugal misconduct complained of. Threats, malicious and wanton, opprobrious words and epithets falsely and wickedly bestowed, all these may so operate upon the timid and sensitive nature of a wife as to undermine her health and incapacitate her from the discharge of the functions of a marriage companion; and by such means the stronger party may in the particular instance have sought purposely to do her a bodily injury. Now, when the health is thus endangered by wanton brutality of language inducing reasonable apprehension of so sinister a design, we think the condition of legal cruelty is fulfilled. For it is admitted that the physical danger under discussion may be, if only sufficient in degree, danger either to the life or limb,

bodily injury or actual menace, does not, he concludes with Lord Stowell, amount to legal cruelty. But he admits that there may be cases in which the husband, without violence, actual or threatened, may make the marriage state impossible to be endured; that there may be angry words, coarse and abusive language, humiliating insults, and annoyances in all the forms that malice can suggest, which may as effectually endanger life or health as personal violence, and which, therefore, would afford grounds of relief by the court. Latham v. Latham, 30 Gratt. 307.

40. Knapp v. Knapp, 23 Cal. App. 10, 136 P. 719.

such as blows and poisoning; or danger merely to the health;[41] it might be deliberate starvation or withholding needful medical assistance.[42] And after much show of reluctance in our earlier judges to investigating such abuses as produce ill-health by operating upon the mind, the weight of judicial opinion is now preponderating in that direction.[43] If it seem a strain of principle to connect such mental inflictions with bodily injuries, we must recur to cruelty *per se,* apart from definitions of legal cruelty, and assure ourselves that purposely frightening a nervous and timorous spouse, and subduing by fear with the malicious design of producing suffering, and making the victim wretched instead of fostering love, is cruel, because it is inhuman, hard-hearted, and brutal.

There is much difference of opinion as to whether cruelty presupposes physical violence and injury to health, many courts holding that this is essential,[44] or that reasonable apprehension of it may be,[45] and even isolated acts of violence not interrupting the

41. Ayl. Parer. 228.

42. Butler v. Butler, 1 Parsons, 329.

43. Kelly v. Kelly, L. R. 2 P. & D. 31, 59; Butler v. Butler, 1 Parsons, 329; Bailey v. Bailey, 97 Mass. 373; Powelson v. Powelson, 22 Cal. 358; Beyer v. Beyer, 50 Wis. 254; Wheeler v. Wheeler, 53 Ia. 511.

Under a statute which divorces for "such inhuman treatment as to endanger the life" of the wife, danger to health is held to be included by construction; for to impair health is to jeopardize life. Cole v. Cole, 23 Ia. 433.

44. Cowden v. Cowden, 5 Alaska, 311; Prall v. Prall, 58 Fla. 496, 50 So. 867; Whitlock v. Whitlock, 268 Ill. 218, 109 N. E. 6, reversing judgment 187 Ill. App. 165; Maddox v. Maddox, 189 Ill. 152, 59 N. E. 599; Compton v. Compton, 204 Ill. App. 629; Freeborn v. Freeborn, 168 Mass. 50, 46 N. E. 428; Armstrong v. Armstrong, 229 Mass. 592, L. R. A. 1918D, 426, 118 N. E. 916 (mental distress to pregnant wife from alienation of affections is not cruelty); Hart v. Hart, 68 N. H. 478, 39 A. 430; Casey v. Casey, 83 N. J. Eq. 603, 93 A. 720; Schulze v. Schulze, 33 Pa. Super. Ct. 325; Hexamer v. Hexamer, 42 Pa. Super. Ct. 226. See Severns v. Severns, 107 Ill. App. 141.

45. Carr v. Carr, 171 Ala. 600, 55 So. 96; Hancock v. Hancock, 55 Fla. 680, 45 So. 1020, 15 L. R. A. (N. S.) 670; Beekman v. Beekman, 53 Fla. 858, 43 So. 923; Brown v. Brown, 129 Ga. 246, 58 S. E. 825; Ring v. Ring, 118 Ga. 183, 44 S. E. 861, 62 L. R. A. 878 (conduct justifying apprehension to life, limb or health); Rader v. Rader, 136 Ia. 223, 113 N. W. 817; Thompson v. Emery, 127 La. 718, 53

connubial relationship are not a cause for divorce,[46] while others regard mental distress caused by unjustifiable acts of the libellee, and resulting in injury to health, as sufficient,[47] or any acts continued in causing serious loss of health;[48] and in some States the continuance of unjustifiable harsh or humiliating acts causing

So. 968; Williams v. Williams, 101 Minn. 400, 112 N. W. 528; Humber v. Humber, 68 So. 161; Simon v. Simon, 34 Pa. Super. Ct. 182; Huff v. Huff, 73 W. Va. 330, 80 S. E. 846; Maxwell v. Maxwell, 69 W. Va. 414, 71 S. E. 571.

46. Mahnken v. Mahnken, 9 N. D. 188, 82 N. W. 870; Hewitt v. Hewitt (N. J. Ch.), 3 A. 1011; Weigel v. Weigel, 60 N. J. Eq. 322, 47 A. 183; Beach v. Beach, 4 Okla. 359, 46 P. 514; Howe v. Howe, 16 Pa. Super. Ct. 193; Fay v. Fay, 27 Pa. Super. Ct. 328; McKay v. McKay, 24 Tex. Civ. App. 629, 60 S. W. 318; Johnson v. Johnson, 107 Wis. 186, 83 N. W. 291, 81 Am. St. Rep. 836.

47. Kientz v. Kientz, 104 Ark. 381, 149 S. W. 86; Smith v. Smith, 119 Cal. 183, 48 P. 730; Harding v. Harding, 36 Colo. 106, 85 P. 423; Ogden v. Ogden, 17 App. D. C. 104 (mental suffering endangering life is sufficient); Stoner v. Stoner, 134 Ga. 368, 67 S. E. 1030; Ford v. Ford, 146 Ga. 173, 91 S. E. 42 (wilful infliction of pain, bodily or mental, justifying danger to life, limb or health); England v. England (Ga.), 96 S. E. 174; De Cloedt v. De Cloedt, 24 Ida. 277, 133 P. 664; Hullinger v. Hullinger, 133 Ia. 269, 110 N. W. 470; Carson v. Carson (Ia.), 171 N. W. 584; Pooley v. Pooley, 178 Ia. 19, 157 N. W. 129; Luettjohann v. Luettjohann, 147 Ia. 286, 126 N. W. 172; Thompson v. Thompson (Ia.), 173 N. W. 55; Sylvester v. Sylvester, 109 Ia. 401, 80 N. W. 547; Wells v. Wells, 116 Ia. 59, 89 N. W. 98. See earlier cases apparently *contra*, Blair v. Blair, 106 Ia. 269, 76 N. W. 700. McClintock v. McClintock, 147 Ky. 409, 144 S. W. 68; Johnson v. Johnson (Ky.), 209 S. W. 385; McCue v. McCue, 191 Mich. 1, 157 N. W. 369; Root v. Root, 164 Mich. 638, 130 N. W. 194, 17 Det. Leg. N. 1222; Myers v. Myers, 88 Neb. 656, 130 N. W. 254; Preuit v. Preuit, 88 Neb. 124, 129 N. W. 175; Berdolt v. Berdolt, 56 Neb. 792, 77 N. W. 399 (false charge of impotency); Ellison v. Ellison, 65 Neb. 412, 91 N. W. 403; Rindlaub v. Rindlaub, 19 N. D. 352, 125 N. W. 479; Morris v. Morris, 177 N. Y. S. 600; Robertson v. Robertson (Okla.), 176 P. 387; Ryan v. Ryan (Tex. Civ. App. 1908), 114 S. W. 464; McNabb v. McNabb (Tex. Civ. App.), 207 S. W. 129; Bush v. Bush (Tex. Civ. App. 1907), 103 S. W. 217; Claunch v. Claunch (Tex. Civ. App), 203 S. W. 930; Mathewson v. Mathewson, 81 Vt. 173, 69 A. 646; Cevene v. Cevene, 143 Wis. 393, 127 N. W. 942. See Smith v. Smith (Tex. Civ. App.), 200 S. W. 1129; Whitehead v. Whitehead, 84 Vt. 321, 79 A. 516 (knowledge of wife's infidelity not cause of injury to health).

48. Maget v. Maget, 85 Mo. App. 6.

grievous mental suffering will be cruelty even without physical violence.[49]

Allegations in a petition for divorce for extreme cruelty that the wife repeatedly struck and assaulted the plaintiff, used violent and abusive language toward him, falsely charged him with having committed adultery, endeavored to get his employer to discharge him and resorted to legal proceedings to compel him to support her, are insufficient, as no imminence or even probability of personal injury by violence or loss of health by reason of annoyance and vexation is in any form alleged.[50]

49. Koehler v. Koehler (Ark.), 209 S. W. 283; Perkins v. Perkins, 29 Cal. App. 68, 154 P. 483; Donnelly v. Donnelly, 26 Cal. App. 577, 147 P. 582; Dickinson v. Dickinson, 54 Ind. App. 53, 102 N. E. 389; Rader v. Rader, 136 Ia. 223, 113 N. W. 817; Rowe v. Rowe, 84 Kan. 696, 115 P. 553; Williams v. Varnardo, 117 La. 905, 42 So. 419 (public abuse, etc.); Outlaw v. Outlaw, 118 Md. 498, 84 A. 383; McDuffee v. McDuffee, 169 Mich. 410, 135 N. W. 242 (reminding wife of previous adultery); Begrow v. Begrow, 17 Det. Leg. N. 602, 127 N. W. 256; Stevens v. Stevens, 170 Mo. App. 322, 156 S. W. 68; Mills v. Mills, 88 Neb. 596, 130 N. W. 419; Sanders v. Sanders, 157 N. C. 229, 72 S. E. 876; Thompson v. Thompson, 156 N. W. 492; Mosher v. Mosher, 16 N. D. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820 (fault finding); Russell v. Russell, 37 Pa. Super Ct. 348; Dawson v. Dawson (Tex. Civ. App. 1910), 132 S. W. 379; Lefevre v. Lefevre (Tex. Civ. App.), 205 S. W. 842 (continuous insults); Shook v. Shook (Tex. Civ. App. 1910), 125 S. W. 638; Holm v. Holm, 44 Utah, 242, 139 P. 937 (wife loving another man); Glenn v. Glenn, 84 Wash. 215, 146 P. 619 (wife associating with improper men); Banks v. Banks, 155 N. W. 916.

50. Huff v. Huff (W. Va.), 80 S. E. 846, 51 L. R. A. (N. S.) 282.

CHAPTER XIV.

CRUELTY: FACTS SHOWING INCOMPATIBILITY.

SECTION 1578. Incompatibility.
1579. Rendering Cohabitation Insupportable.
1580. Quarrels.
1581. Quarrels Over Conveyance of Property.
1582. Unconcealed Aversion.
1583. Discourtesy.
1584. Refusal to Entertain Spouse.
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1587. Threats; Reasonable Apprehension of Danger.
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1589. Abusing Child or Others to Annoy Spouse.
1590. Scolding; Faultfinding.
1591. Drunkenness or Use of Drugs.
1592. Confession of Crimes.
1593. Wanton Damage to Property of Spouse.

§ 1578. Incompatibility.

A divorce for cruelty will not be granted to a couple merely because they are unsuited to each other,[51] but conduct destroying the possibility of living together as husband and wife may be a ground for divorce.[52]

§ 1579. Rendering Cohabitation Insupportable.

Cruelty or extreme cruelty as a statutory cause of divorce means any such conduct as entirely subverts the family relations by rendering the association intolerable, as persons are bound to submit to the ordinary consequences of human infirmity and unwise selec-

51. Williams v. Williams, 136 Ky. 71, 123 S. W. 337 (mere lewdness); Root v. Root (Mich.), 130 N. W. 194, 32 L. R. A. (N. S.) 837.

52. Olberding v. Gohres, 107 La. 715, 31 So. 1028 (outrages though no force used); Dowden v. Dowden, 119 La. 325, 44 So. 115 (repeated abandonment and defamation); Slaughter v. Slaughter, 106 Mo. App. 104, 80 S. W. 3 (continual abuse); Walker v. Walker, 95 A. 925 (improper relations with another though not adulterous).

tion,[53] but not wherever the conditions are such that the plaintiff finds living with the defendant insupportable.[54]

§ 1580. Quarrels.

A divorce will not be granted for petty quarrels between husband and wife,[55] especially when brought on in part by the fault of the libellant;[56] nor violence on the part of either, committed during

53. Ward v. Ward, 23 Colo. 33, 52 P. 1105; Spitzmesser v. Spitzmesser, 26 Ind. App. 532, 60 N. E. 315; Burns v. Burns, 173 Ky. 105, 190 S. W. 683; Hooe v. Hooe, 122 Ky. 590, 92 S. W. 317, 29 Ky. Law Rep. 113, 5 L. R. A. (N. S.) 729 (settled aversion for six months as cruelty); Veal v. Veal, 140 La. 879, 74 So. 181; French v. French, 4 Mass. 587; Cooper v. Cooper, 17 Mich. 205, 97 Am. Dec. 182; Bennett v. Bennett, 24 Mich. 482; Tripp v. Tripp, 78 Mo. App. 413 (payment of wife's board bills does not justify indignities offered her). Andrew v. Andrew, 53 Ore. 531, 99 P. 938; Mendelson v. Mendelson, 37 Ore. 163, 61 P. 645 (requesting wife's brother to leave house is not cruelty to wife); Lewis v. Lewis, 63 Pa. Super. Ct. 82; Fay v. Fay, 27 Pa. Super. Ct. 328; Doe v. Doe, 48 Utah, 200, 158 P. 781; Hieke v. Hieke, 163 Wis. 171, 157 N. W. 747 (refusing to speak to wife and leaving her without medical attention).

Conditions considered. In divorce for extreme cruelty, not only the specific acts of cruelty alleged and proved, but conditions caused by defendant which aggravate such acts should also be considered. McGrew v. McGrew, 87 Neb. 423, 127 N. W. 121.

Cruelty after decree. A husband, obtaining a divorce voidable at the election of the wife, may not rely on acts of cruelty committed by the wife during the decree, and before its vacation as a ground for divorce. Andrade v. Andrade, 14 Ariz. 379, 128 P. 813.

54. Grierson v. Grierson, 156 Cal. 434, 105 P. 120; Meunier v. Thibodaux, 136 La. 655, 67 So. 540; Gloster v. Gloster, 48 N. Y. S. 160, 23 App. Div. 336.

55. Sneed v. Sneed, 14 Ariz. 17, 123 P. 312; Connor v. Connor, 107 La. 453, 31 So. 766; Graff v. Graff, 136 La. 749, 67 So. 817; Appleby v. Appleby, 2 McCarty, Civ. Proc. (N. Y.) 422; Umbach v. Umbach, 171 N. Y. S. 138, 183 App. Div. 495.

Refusal of a husband to permit his wife to keep boarders is no ground for separation. Blair v. Blair, 145 N. Y. S. 976, 160 App. Div. 781; Morris v. Morris, 177 N. Y. S. 600; Barker v. Barker, 25 Okla. 48, 105 P. 347; Hartman v. Hartman (Tex. Civ. App.), 190 S. W. 846 (refusal of husband to sell home and move to another community); Dority v. Dority (Tex. Civ. App.), 62 S. W. 106.

56 Crounse v. Crounse, 108 Va. 108, 60 S. E. 627.

a quarrel in which both are at fault, and one spouse suffered about as much as the other.[57]

The fact that the husband refused to allow the wife to participate in the conduct of his business, which resulted in violent quarrels and bickerings between them, is not of itself a cause for divorce for extreme cruelty. Neither incompatibility of temper nor the ordinary misunderstandings and bickerings which are characteristic of the marriage relation in a considerable percentage of cases constitute extreme cruelty.[58]

The fact that husband and wife quarrelled on two occasions does not justify her in leaving him so that she can acquire a separate domicile to give jurisdiction of an action of divorce in another State. Nowhere has an occasional and isolated disturbance of the family relations participated in by both of the spouses been considered sufficient to authorize the dissolution of the marriage relation. Sporadic quarrels or disagreements between the spouses in which both of the parties are equally guilty are not to be treated by the courts as constituting grounds for divorce.[59]

§ 1581. Quarrels Over Conveyance of Property.

Cruelty is not shown by the wife refusing to join with the husband in conveying real estate,[60] nor because he threatens to sell community property when she desires to keep it.[61]

§ 1582. Unconcealed Aversion.

Unconcealed aversion[62] or acts showing settled aversion may be legal cruelty,[63] but the manifestation by either of mere heartless

57. Soper v. Soper, 29 Mich. 305; Cooper v. Cooper, 10 La. 249.

58. Root v. Root (Mich.), 130 N. W. 194, 32 L. R. A. (N. S.) 837.

59. Tackaberry Co. v. Sioux City Service Co. (Ia.), 132 N. W. 945, 40 L. R. A. (N. S.) 102.

60. Hofman v. Hofman, 40 Ind. App. 476, 82 N. E. 477.

61. Simon v. Meaux (La.), 79 So. 330.

62. Sabot v. Sabot, 97 Wash. 395, 166 P. 624.

63. Zumbiel v. Zumbiel, 113 Ky. 841, 69 S. W. 708, 24 Ky. Law Rep. 590; Duhon v. Duhon, 110 La. 240, 34 So. 428; Bailey v. Bailey, 121 Mich. 236, 8 N. W. 32, 6 Det. Leg. N.

disregard of the marriage vow and obligations may not be.[64]

The mere fact that a wife who had borne her husband seven children treats him coldly and denies him sexual intercourse, and refuses to speak to him on the street, although she continues to take care of his house and children, is not a ground of divorce. It is not cruel and inhuman treatment, and as long as the wife stays under her husband's roof it is not desertion.[65]

§ 1583. Discourtesy.

Discourtesy[66] or mere acts of uncouth rudeness are not cruelty.[67]

§ 1584. Refusal to Entertain Spouse.

That a husband refused to take his wife to places of entertainment and is a poor companion is not cause of divorce.[68]

§ 1585. Acts of Suspicion.

Mere acts of suspicion do not constitute legal cruelty justifying a divorce.[69]

§ 1586. Ill Temper.

Actions which are evidence of ill temper or a quarrelsome disposition[70] like occasional or frequent exhibition of anger

468; Reinhard v. Reinhard, 96 Wis. 555, 71 N. W. 803.

A cold and sullen manner by the husband with continual complaints may be insufficient to constitute cruelty. Downey v. Downey, 135 Mich. 265, 97 N. W. 699, 10 Det. Leg. N. 739.

64. Miller v. Miller, 43 Ia. 325.

65. Wills v. Wills (W. Va.), 82 S. E. 1092, L. R. A. 1915B, 770.

66. Trenchard v. Trenchard, 245 Ill. 313, 92 N. E. 243; Wills v. Wills, 74 W. Va. 709, 82 S. E. 1092.

67. Donohue v. Donohue, 167 N. Y. S. 715, 180 App. Div. 561 (throwing headgear in wife's face).

68. Bowen v. Bowen, 179 Mich. 574, 146 N. W. 271; Johnsen v. Johnsen, 78 Wash. 423, 139 P. 189, reh. den., *Id.* 1200.

69. Dickinson v. Dickinson (Tex. Civ. App. 1911), 138 S. W. 205 (wife employing detectives to follow husband).

70. Geisseman v. Geisseman, 34 Colo. 481, 83 P. 635; Birdsong v. Birdsong (Ky.), 206 S. W. 22; Cooper v. Cooper, 17 Mich. 205, 97 Am. Dec. 182; Beller v. Beller, 50 Mich. 49, 14 N. W. 696; Rose v. Rose, 50 Mich. 92, 14 N. W. 711; Thomas v. Thomas, 87 N. J. Eq. 668, 101 A. 1055, 103 A. 675; Mendelson v. Mendelson, 37

or bad temper,[71] especially when both parties are at fault,[72] nor an occasional outburst of passion, nor mere abuse, however gross, apart from treatment in the presence of others, are not causes for divorce in themselves.[73] But even though abusive language will not be by itself cause sufficient for divorce on the ground of legal cruelty, yet, where blows are proved, abusive language may be taken into view for determining their character as constituting the offence at issue.[74] The nature and character of the violence and threats being material, this would tend to explain it as justifying the apprehension complained of; upon which suggestion evidence of the spouse's drunkenness at the time has been admitted in the same connection;[75] and one's habitual abusive misconduct towards his spouse, and his ordinary ill-temper.[76]

Cruelty as a cause of divorce includes any conduct on the part of the husband or wife which is calculated to seriously impair the health or permanently destroy the happiness of the other. The object of the court is not to punish the offender, but to protect the unfortunate; and while a decree of divorce or separation should never be granted upon slight differences, which are likely to arise at times in the best regulated families, it should not be denied when it is made clearly to appear that the conduct of the offending party is such that to continue the marital relation would either permanently destroy the happiness or ruin the health of the other. Where a wife is made ill by the husband's fits of rage and statements that they would have to separate, and by his constant neglect

Ore. 163, 61 P. 645; McNabb v. McNabb (Tex. Civ. App.), 207 S. W. 129.

71. Trenchard v. Trenchard, 245 Ill. 313, 92 N. E. 243; Kinsey v. Kinsey, 124 N. Y. S. 30; Schulze v. Schulze, 33 Pa. Super. Ct. 325.

72. Holmes v. Holmes, 44 Mich. 555; Shuster v. Shuster, 2 Neb. (Unof.) 610, 92 N. W. 203.

73. Ruckman v. Ruckman, 58 How. (N. Y.) Pr. 278; Evans v. Evans, 1 Hag. Con. 35; Latham v. Latham, 30 Gratt. 307.

74. Farnham v. Farnham, 73 Ill. 497; Day v. Day, 56 N. H. 316; Dr. Lushington, in Dysart v. Dysart, 1 Robertson, 106.

75. Coursey v. Coursey, 60 Ill. 186.

76. Otway v. Otway, 2 Phillim. 95; Westmeath v. Westmeath, 4 Eng. Ec. 238.

and conduct in the presence of others, humiliating her, a separation may be granted.[77]

§ 1587. Threats; Reasonable Apprehension of Danger.

It seems to be the general rule in this country that mere words will not constitute cruelty, as in case of threats,[78] nor simply breaking dishes, using grossly improper language, and in a momentary gust threatening to kick the spouse from the house,[79] but threats of serious personal violence will be cruelty.[80]

The reasonable apprehension of danger is the main ingredient which, all the circumstances considered, will, on the ground of cruelty, induce the divorce court to interfere and pronounce the sentence. Such was the English doctrine as expounded by Lord Stowell, Sir John Nicholl, and Dr. Lushington, and such is the doctrine as stated to-day by Mr. Bishop.[81] Inasmuch, then, as divorce for cruelty is mainly allowed as a protection against probable anticipated cruelty, where there is no reasonable apprehension that the cruelty will continue,[82] or where the conduct of the threatening spouse indicates that he does not really intend to carry out his threats divorce will usually be refused.[83]

Godolphin laid it down that even though the wife had blamelessly fled from her cruel husband, she would have to return if he gave adequate security against a repetition of his misconduct, or else forfeit all claim to alimony.[84] That, however, offends one's innate sense of justice; for what bonded security against crime can relieve the innocent victim from danger? Sureties may re-

77. McClintock v. McClintock, 147 Ky. 409, 144 S. W. 68, 39 L. R. A. (N. S.) 1127.

78. Duberstein v. Duberstein, 171 Ill. 133, 49 N. E. 316; Carlisle v. Carlisle, 99 Ia. 247, 68 N. W. 681.

79. Close v. Close, 24 N. J. Eq. 338.

80. Gastauer v. Gastauer, 132 La. 941, 61 So. 879; Griffith v. Griffith, 77 Neb. 180, 108 N. W. 981.

81. Evans v. Evans, 1 Hag. Con. 35; Lockwood v. Lockwood, 2 Curt. Ec. 281; Westmeath v. Westmeath, 4 Eng. Ec. 238.

82. *Ib.;* English v. English, 27 N. J. Eq. 579.

83. Ramsey v. Ramsey, 162 Ky. 741, 172 S. W. 1082; Miller v. Miller, 78 N. C. 102.

84. Godol. Abr. 509.

spond in damages, but they cannot prevent the cruel act from being committed upon the first opportunity. No reported instance of modern times confirms such a doctrine; and it is held, on the other hand, that a mere offer of amendment will not absolve the guilty spouse from his misconduct.[85] Indeed, the language of some of our late cases leads strongly to the inference that legal cruelty already committed, in the shape of a deed of actual violence, is enough of itself to entitle the aggrieved party to a divorce;[86] for while the heart remains unchanged, one cruel act is likely to be followed by another.

Reasonable apprehension being thus the great essential, menacing words, apart from blows, may the more readily be accepted as ground for a divorce for cruelty. "In these suits," observes Dr. Lushington, "the species of facts most generally adduced are, first, personal ill-treatment, which is of different kinds, such as blows, or bodily injury of any kind; secondly, threats, of such a description as would reasonably excite, in a mind of ordinary firmness, a fear of personal injury.[87] But the circumstances, of course, should not be light or trifling. There must be reasonable cause for believing that menaces uttered will be carried into effect; and yet at the same time the aggrieved spouse is not compelled to wait until the injury is actually done.[88]

As to language alone, menaces, threats of violence, seriously understood and inducing reasonable apprehension of bodily injury, or even charges of infidelity, made in bad faith and in aggravation thereof, make a strong case.[89]

§ 1588. Profanity.

In most cases the mere use of profanity by one spouse to another

85. Kinsey v. Kinsey, 1 Yeates, 78.

86. See Ruckman v. Ruckman, 58 How. (N. Y.) Pr. 278; Close v. Close, 25 N. J. Eq. 526.

87. Neeld v. Neeld, 4 Hag. Ec. 263.

88. Evans v. Evans, 1 Hag. Con. 35; Kennedy v. Kennedy, 73 N. Y. 369, and cases cited; Beebe v. Beebe, 10 Ia. 133; Bailey v. Bailey, 97 Mass. 373.

89. Kennedy v. Kennedy, 73 N. Y. 369.

will not be a cause for divorce,[90] but in many States the habitual use of curses and vile language resulting in injury to health is held to be legal cruelty,[91] although only in the presence of the children.[92] So the repeated application of coarse epithets to a wife, accompanied once by actual bodily harm, and once by threats to take her life, has been held sufficient ground for divorce for cruelty.[93]

§ 1589. Abusing Child or Others to Annoy Spouse.

Cruelty towards others, in order to annoy the spouse, may be legal cruelty,[94] and abusing a child solely to distress the mother and aggravating her illness may be;[95] or agreeing to live with wife only on condition she sends away her dependent infant children.[96]

§ 1590. Scolding; Faultfinding.

Mere faultfinding and scolding by the wife will not constitute

90. Moir v. Moir (Ia.), 165 N. W. 1001 (by wife); Beall v. Beall, 80 Ky. 675, 4 Ky. Law Rep. 652; Hewitt v. Hewitt (N. J. Ch.), 37 A. 1011; Clark v. Clark, 154 P. 1142; Bingham v. Bingham (Tex. Civ. App.), 149 S. W. 214; Bennett v. Bennett, 24 Mich. 482.

91. Smith v. Smith, 119 Cal. 183, 48 P. 730; Thompson v. Thompson, — Ia. —, 173 N. W. 55, 5 L. A. R. 710; Hoyt v. Hoyt, 56 Mich. 50, 22 N. W. 105 (while wife is critically ill); Strahorn v. Strahorn, 82 Mo. App. 580; Ryan v. Ryan, 30 Ore. 226, 47 P. 101; Benfield v. Benfield, 44 Ore. 94, 74 P. 495; Braun v. Braun, 194 Pa. St. 287, 75 Am. St. R. 699; Myers v. Myers, 83 Va. 806, 6 S. E. 630.

The occasional use of profane language towards the wife will not alone constitute cruelty where the husband was on the whole as kind and just as husbands usually are. Gains v. Gains, 26 Ky. Law Rep. 471, 19 S. E. 929.

92. Andrews v. Andrews, 120 Cal. 184, 52 P. 298.

93. Freeman v. Freeman, 31 Wis. 235.

94. Saunders v. Saunders, 10 Jur. 143.

95. Dunlap v. Dunlap, 49 La. Ann. 1696, 22 So. 929.

Whipping defendant's stepdaughter held not cruel treatment entitling the husband to a divorce. Murchison v. Murchison (Tex. Civ. App.), 171 S. W. 790.

96. Williamson v. Williamson (Ky.), 209 S. W. 503, 3 Am. Law Rep. 799 (when he knew of their existence at the time of the marriage and agreed that she might bring them with her).

cruelty, however, as this is one of the ordinary hazards of matrimony;[97] or complaints by one spouse against the other.[98]

§ 1591. Drunkenness or Use of Drugs.

Occasional drunkenness is not cruelty,[99] but will be when the drunkenness is accompanied by other harsh or violent acts,[1] and the habitual use of drugs is not cruelty.[2]

§ 1592. Confession of Crimes.

The husband's confession of his crimes towards others is not cruelty when he is not convicted.[3]

Cruel and abusive treatment is not shown by evidence that the husband frequently left his wife, who was ill, and on his return boasted to her of his illicit relations with other women, even where his conduct injured her health. "Language may be so irritating and so frequently used as to permit the granting of a divorce because of cruel and abusive treatment when injury to health results from it, but where there is no such purpose — although the libellant's health was severely affected — a divorce cannot be granted on this ground . . . Neither words nor acts which do not involve physical violence, inflicted on the other party, are sufficient to constitute cruel and abusive treatment within the meaning of the statute, unless it is shown that the language was

97. Geisseman v. Geisseman, 34 Colo. 481, 83 P. 635; Branschied v. Branschied, 27 Wash. 368, 67 P. 812.

98. Masterman v. Masterman, 5 Kan. 748, 51 P. 277; Mahnken v. Mahnken, 9 N. D. 188, 82 N. W. 870; Biddle v. Biddle, 50 Pa. Super. Ct. 30; De Fierros v. Fierros (Tex. Civ. App.), 154 S. W. 1067.

99. Smith v. Smith, 172 Mich. 175, 137 N. W. 644; Claunch v. Claunch (Tex. Civ. App.), 203 S. W. 930. See further, *ante*, § 1555.

1. Sedgwick v. Sedgwick, 50 Colo. 164, 114 P. 488; Hall v. Hall, 172 Mich. 210, 137 N. W. 536; Murray v. Murray, 169 Mich. 388, 135 N. W. 262.

2. Ring v. Ring, 118 Ga. 183, 44 S. E. 861, 62 L. R. A. 878. See further *ante;* Smith v. Smith, 119 Ga. 239, 46 S. E. 106.

3. Bill v. Bill, 178 Ia. 1025, 157 N. W. 158.

uttered or these acts were committed with a malicious intent and for the purpose of injuring the libellant." [4]

§ 1593. Wanton Damage to Property of Spouse.

Wantonly damaging a spouse's property can hardly be cited as legal cruelty.[5]

4. Armstrong v. Armstrong, 229 Mass. 592, 118 N. E. 916. (It must be remembered, however, that Massachusetts is one of the States holding to the strict rule that physical injury is necessary to constitute cruelty, and the opposite result would undoubtedly have been reached in many States.—Ed. See, for example, *post*, § 1597.

5. Saunders v. Saunders, 10 Jur. 143.

CHAPTER XV.

CRUELTY: FACTS SHOWING INDIGNITIES.

SECTION 1594. Indignities.
1595. Improper Relations With Another.
1596. Compelling Wife to Submit to Abortion.
1597. Forcing Wife to Associate With Lewd Women.
1598. Placing Wife in Insane Hospital.
1599. Sodomy, Bestiality or Vulgarity.
1600. Interference of Others.
1601. Permitting Indignities by Others.
1602. Accusations of Infidelity.
1603. Charges of Infidelity Made in Court Proceedings.
1604. Graundless Prosecution of One Spouse by the Other.
1605. Acts Done by Mistake.

§ 1594. Indignities.

Cruelty may be shown by evidence of various acts of indignity.[6]

§ 1595. Improper Relations with Another.

The wife's relations with the hired man may be such cruel treatment as to entitle the husband to a divorce where they destroy his happiness,[7] and having intercourse with another to the knowledge of the spouse may be cruelty under the more liberal rule.[8]

For a husband openly to consort with loose females and express his preference for them, or to make a brothel out of his own house, is held extreme cruelty in strong instances.[9] But adultery or

6. McGee v. McGee, 72 Ark. 355, 80 S. W. 579; Carpenter v. Carpenter, 30 Kan. 712, 2 P. 122, 46 Am. R. 108 (although no physical violence is used); Avery v. Avery, 33 Kan. 1, 5 P. 418, 52 Am. R. 523; Goff v. Goff, 60 W. Va. 9, 53 S. E. 769.

7. Bearinger v. Bearinger, 170 Mich. 661, 136 N. W. 1117.

8. Aitchison v. Aitchison, 99 Ia. 93, 68 N. W. 573; Craig v. Craig, 129 Ia. 192, 105 N. W. 446, 2 L. R. A. (N. S.) 669; Lumbiel v. Lumbiel, 113 Ky. 841, 69 S. W. 708, 24 Ky. Law Rep. 590; Holmes v. Holmes, — La. —, 23 So. 324. See learned note in L. R. A. 1918D, 427.

9. McClung v. McClung, 40 Mich. 493; Lord Stowell, in Popkin v. Popkin, 1 Hag. Ec. 765.

lewdness with other women, which the offending husband carries on clandestinely, is not cruelty.[10]

§ 1596. Compelling Wife to Submit to Abortion

Compelling the wife to submit to abortion is cruelty.[11]

§ 1597. Forcing Wife to Associate with Lewd Women.

It may be cruelty for a man to force his wife to associate with a lewd woman.[12] So a divorce may be granted for extreme cruelty where, while the wife was in bed from the effects of a serious operation, the husband introduces into the house as a servant a woman of loose character, who enters their bedroom and commits various improprieties, and where the husband also makes to the wife various remarks as to another woman calculated to drive any pure woman to the verge of insanity, inflicting cruel suffering.[13]

§ 1598. Placing Wife in Insane Hospital.

Placing a wife in an insane hospital on reasonable grounds with the intent to protect her is not cruelty.[14]

§ 1599. Sodomy, Bestiality or Vulgarity.

Acts of bestiality by the husband with others of the male sex may be cruelty.[15]

§ 1600. Interference of Others.

Acts or conditions brought on by the interference of others are not legal cruelty unless assented to by the spouse.[16]

10. Miller v. Miller, 78 N. C. 102.

11. Platner v. Platner (Ia.), 162 N. W. 613; Dunn v. Dunn, 150 Mich. 476, 14 Det. Leg. N. 767, 114 N. W. 385; Sheldon v. Sheldon, 131 N. Y. S. 291, 146 App. Div. 430.

12. Tower v. Tower, 119 N. Y. S. 506, 134 App. Div. 670.

13. Hooker v. Hooker, (Fla.), 61 So. 121, 43 L. R. A. (N. S.) 964. See *ante*, § 1592.

14. Kuster v. Kuster, 74 N. Y. S. 853, 37 Misc. 136.

15. Crutcher v. Crutcher, 86 Miss. 231, 38 So. 337. See further *post*.

16. Lane v. Bursha, 50 La. Ann. 275.

§ 1601. Permitting Indignities by Others.

The husband is chargeable with cruelty where he allows third persons to abuse his wife,[17] and is properly charged with cruelty to the wife exhibited by persons with whom he compels her to live, as he is legally liable for such acts.[18] Furthermore, the husband's failure to resent indecent proposals made to the wife by his hired man, where the husband besides jerked and threw his wife upon the floor when she was about to become a mother, is cruelty in law.[19]

Where the husband is too poor to support his wife anywhere than at the home of his mother, and he always treated his wife kindly, but his mother abused the wife, she may leave him and obtain a divorce for cruelty. This decision goes farther than others, as here the husband was without fault.[20]

§ 1602. Accusations of Infidelity.

Cruelty may consist in false charges of infidelity made by one spouse against the other,[21] whether the injured party is the

17. Snyder v. Snyder, 98 Misc. 431, 162 N. Y. Supp. 607; Sayles v. Sayles (R. I.), 103 A. 225.

18. Thompson v. Thompson (Mich.), 171 N. W. 347 (abuse by husband's mother with whom husband compels her to live); Dakin v. Dakin, 1 Neb. (Unof.) 457, 95 N. W. 781; Snyder v. Snyder, 162 N. Y. S. 607, 98 Misc. 431 (mother-in-law).

19. Beyer v. Beyer, 50 Wis. 254.

20. Thompson v. Thompson (Mich.), 171 N. W. 347.

21. Day v. Day, 5 Alaska, 584; Olsen v. Olsen, 5 Alaska, 459; McGee v. McGee, 72 Ark. 355, 80 S. W. 579; Smith v. Smith, 119 Cal. 183, 48 P. 730; Andrews v. Andrews, 120 Cal. 184, 52 P. 298; McDonald v. McDonald, 155 Cal. 665, 102 P. 927; Wickland v. Wickland, 19 Cal. App. 559, 126 P. 507; Morehouse v. Morehouse, 70 Conn. 420, 39 A. 516; Wetherington v. Wetherington, 57 Fla. 551, 49 So. 549; Miller v. Miller, 139 Ga. 282, 77 S. E. 21; Driver v. Driver (Ind. 1898), 52 N. E. 401; Cooper v. Cooper, 51 Ind. App. 374, 99 N. E. 782; Luick v. Luick, 132 Ia. 302, 109 N. W. 783; Haight v. Haight (Ia. 1900), 82 N. W. 443; Martin v. Martin, 150 Ia. 223, 129 N. W. 816; Turner v. Turner, 122 Ia. 113, 97 N. W. 997; Wesley v. Wesley, 181 Ky. 135, 204 S. W. 165 (made in bad faith); Johnson v. Johnson (Ky.), 209 S. W. 385; Waldhorn v. Woldhorn, 165 Mich. 130, 130 N. W. 199, 18 Det. Leg. N. 15; Krusinski v. Krusinski, 170 Mich. 561, 136 N. W. 593; Delor v. Delor, 159 Mich. 624, 124 N. W. 544, 16 Det. Leg. N. 973; Campbell v. Campbell, 149 Mich.

wife[21a] or the husband.[21b] The mere fact that at the time the charges are made the parties are living apart does not necessarily prevent such charges from constituting extreme cruelty.[21c] It is relevant and important only as it may aid in determining the question whether such charges inflicted grievous mental suffering upon the injured party. While the words and acts were not so aggravating and unbearable as they would have been if the parties had been living together, yet the very fact that it is the spouse who makes the charges must inevitably tend to make them more credible than if made by a stranger, and the effect on the plaintiff's mind would be equally great in the one case as in the other.[22] Even the malicious use of opprobrious and foul epithets before others, imputing to the wife a lewd character, may be legal cruelty, as this is the point upon which all virtuous women are most sensitive in

147, 112 N. W. 481, 14 Det. Leg. N. 284; Hertz v. Hertz, 126 Minn. 65, 147 N. W. 825; Williams v. Williams, 101 Minn. 400, 112 N. W. 528; Milster v. Milster (Mo. App.), 209 S. W. 620; Rose v. Rose, 129 Mo. App. 175, 107 S. W. 1089; Berdolt v. Berdolt, 56 Neb. 792, 77 N. W. 399; Walton v. Walton, 57 Neb. 102, 77 N. W. 392; Pedersen v. Pedersen, 88 Neb. 55, 128 N. W. 649 (charge of incest); Votaw v. Votaw, 90 Neb. 699, 134 N. W. 410; McNamara v. McNamara, 93 Neb. 190, 139 N. W. 1045; Gordon v. Gordon, 77 N. H. 597, 92 A. 546; Smith v. Smith, 87 N. Y. S. 137, 92 App. Div. 442; Hildebrand v. Hildebrand, 41 Okla. 306, 137 P. 711; Lyon v. Lyon, 39 Okla. 111, 134 P. 650; Folkenberg v. Folkenberg, 58 Ore. 267, 114 P. 99; Aycock v. Aycock (Tex. Civ. App. 1910), 131 S. W. 1139; Rivers v. Rivers (Tex. Civ. App. 1910), 133 S. W. 524; Morris v. Morris, 57 Wash. 465, 107 P. 186. See Elliott v. Elliott, 93 A. 963.

21a. Ellison v. Ellison, 65 Neb. 412, 91 N. W. 403; Morris v. Morris, 57 Wash. 465, 107 P. 186.

21b. McDonald v. McDonald, 155 Cal. 665, 102 P. 927, 25 L. R. A. (N. S.) 45; Waldhorn v. Waldhorn (Mich.), 130 N. W. 199; Miller v. Miller (Neb.), 131 N. W. 203, 34 L. R. A. (N. S.) 360.

21c. McDonald v. McDonald, 155 Cal. 665, 102 P. 927, 25 L. R. A. (N. S.) 45; Miller v. Miller (Neb.), 131 N. W. 203, 34 L. R. A. (N. S.) 360.

22. Stewart v. Stewart, 175 Ind. 412, 94 N. E. 564.

That a husband and wife are living apart when false charges of adultery are wantonly made by one spouse against the other does not of itself prevent such charges from constituting extreme cruelty. Beach v. Beach, 4 Okla. 359, 46 P. 514.

feeling,[23] though it may be doubted whether our courts would invariably go so far.[24] Such charges are not a cause for divorce when made on reasonable grounds,[25] or when true,[26] or when not made in the presence of third persons and not injuring the health of the accused party.[27]

§ 1603. Charges of Infidelity Made in Court Proceedings.

Cruelty may be predicated on charges by one against the chastity of the other made in divorce pleadings and supported by statements and evidence at the trial,[28] but such testimony in court has been held privileged and not a ground for divorce.[29]

§ 1604. Groundless Prosecution of One Spouse by the Other.

A groundless prosecution of the husband by his wife for an assault, which she alleges produced her miscarriage, may not be cruelty in the legal sense.[30]

§ 1605. Acts Done by Mistake.

Acts done by mistake without intention to do wrong are not a cause for divorce for cruelty.[31]

23. Wheeler v. Wheeler, 53 Ia. 511; Pinkard v. Pinkard, 13 Tex. 356.

24. *Cf.* Durant v. Durant, 1 Hag. Ec. 733; Gale v. Gale, 2 Robertson, 421; Farnham v. Farnahm, 73 Ill. 497; Day v. Day, 56 N. H. 516.

25. Sample v. Sample, 82 Neb. 37, 116 N. W. 953; Pearson v. Pearson, 173 N. Y. S. 563; Beach v. Beach, 4 Okla. 359, 46 P. 514; Aikens v. Aikens, 57 Pa. Super. Ct. 424.

26. Fuller v. Fuller, 108 Ga. 256, 33 S. E. 865.

27. Harkins v. Harkins, — Ia. —, 99 N. W. 154.

28. Wilson v. Wilson, 97 Ark. 643, 134 S. W. 963; Brandt v. Brandt (Cal.), 174 P. 55 (if charge of adultery inflicts grievous mental suffering); Rodgers v. Rodgers, 13 Ky. Law Rep. 526.

29. Mathewson v. Mathewson, 81 Vt. 173, 69 A. 646.

30. Small v. Small, 57 Ind. 568.

31. Kuhl v. Kuhl, 124 Cal. 57, 56 P. 629 (false charge of theft); Brown v. Brown, 129 Ga. 246, 58 S. W. 825; Ring v. Ring, 118 Ga. 183, 44 S. E. 861, 62 L. R. A. 878; Reichert v. Reichert, 124 Mich. 694, 83 N. W. 1008, 7 Det. Leg. N. 389.

CHAPTER XVI.

CRUELTY: FACTS SHOWING NEGLECT OF DUTY.

SECTION 1606. Abandonment.
1607. Failure to Provide Proper Support.
1608. Turning Spouse Out of House.
1609. Failure to Care for Husband.
1610. Sexual Intercourse.
1611. Denial of Sexual Intercourse.
1612. Loathsome Disease.

§ 1606. Abandonment.

Mere abandonment is not cruelty,[32] and neither is it cruelty for the wife to leave the husband and refuse to cohabit with him,[33] but abandonment may be one element in a course of treatment constituting cruelty.[34]

§ 1607. Failure to Provide Proper Support.[35]

Refusal of a husband to grant proper support may be cruelty,[36] but cruelty is not usually constituted by the husband's refusal or inability to provide a home such as she desires,[37] or by imposing hardship as in failure to provide a suitable home, clothing or food,[38] nor mere neglect to supply food and clothing, at least under circumstances not wanton or heinous, since the wife has usually other remedies for such a case to keep her from suffering,[39] nor

32. Murnan v. Murnan, 128 Mich. 680, 87 N. W. 1039, 8 Det Leg. N. 861; Vercade v. Vercade, 147 Mich. 398, 110 N. W. 942, 13 Det. Leg. N. 1033; Slaughter v. Slaughter (Tex. Civ. App. 1909), 118 S. W. 193. See further *ante*.

33. Wagner v. Wagner (Mich.), 168 N. W 1019.

34. Broyles v. Broyles, 32 Ky. Law Rep. 445, 106 S. W. 212; Wilson v. Wilson, 18 Ky. Law Rep. 741, 38 S. W. 140; Eistedt v. Eistedt, 153 N. W. 676.

35. Non-support as separate cause of divorce, see *post*, § 1670.

36. Dean v. Dean, 181 Mich. 498, 148 N. W. 179.

37. Thompson v. Thompson (Mich.), 171 N. W. 347.

38. Maddox v. Maddox, 189 Ill. 152, 59 N. E. 599, 52 L. R. A. 628.

39. Faller v. Faller, 10 Neb. 144. But to deliberately starve a wife, or

the denial of necessaries or luxuries in general, especially if there be no pecuniary resources.[40]

§ 1608. Turning Spouse Out of House.

It is extreme cruelty where the husband gives the wife all his property and she then turns him out of the house.[41]

§ 1609. Failure to Care for Husband.

Even where a wife fails to remain at home and care for her sick husband, if he is not dependent solely on her this is not the kind of cruelty which is meant by the statutes.[42]

§ 1610. Sexual Intercourse.

Cruelty may consist in forcing the wife to consent to sexual intercourse excessively, resulting in injuring her health,[43] or when pregnant,[44] but persistent efforts by the husband to consummate the marriage are not usually cruelty.[45]

§ 1611. Denial of Sexual Intercourse.

There is some conflict in the decisions as to whether denial of sexual intercourse is a cause of divorce. The results depend largely on the wording of the various statutes, and such refusal has been held not to be "utter desertion"[46] or "wilful deser-

withold needful medical supplies, is different. Butler v. Butler, 1 Parsons, 329; Smedley v. Smedley, 30 Ala. 714.

40. "Of course, the denial of little indulgencees and particular accommodations, which the delicacy of the world is apt to number among its necessaries, is not cruelty." Lord Stowell, in Evans v. Evans, 1 Hag. Con. 35.

41. Benore v. Benore (Mich.), 164 N. W. 468.

42. Bonney v. Bonney, 175 Mass. 7, 55 N. E. 461, 78 Am. St. R. 473.

43. Ridley v. Ridley, — Ia. —, 100 N. W. 1122 (the wife need not prove that she used physical force or engaged in a heated controversy to show that she did not consent to sexual excesses); English v. English, 27 N. J. Eq. 579; Gardner v. Gardner, 104 Tenn. 410, 58 S. W. 342, 78 Am. St. R. 924.

44. *Compelling pregnant wife to submit* to sexual intercourse by force may be cruelty. McAllister v. McAllister, 28 Wash. 613, 69 P. 119.

45. Axton v. Axton (Ky.), 206 S. W. 480.

46. Stewart v. Stewart, 78 Me. 548, 7 A. 473, 57 Am. R. 822.

tion,"[47] but it is "cruelty"[48] according to the weight of authority, and refusal for a long period without reason to cohabit may be cruelty.[49] The offence seems, however, rather akin to other causes of divorce than cruelty,[50] and it is therefore often held that a mere denial of sexual intercourse is not cruelty within the statute.[51]

§ 1612. Loathsome Disease.

Unscrupulous intercourse with one's wife after being infected with a venereal disease, so as to communicate it to her, will be cruelty in the eyes of the law.[52]

47. Fritz v. Fritz, 138 Ill. 436, 28 N. E. 1058, 14 L. R. A. 685, 32 Am. St. R. 156; Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L. R. A. (N. S.) 577; Pfannebecker v. Pfannebecker, 133 Ia. 425, 110 Am. St. R. 608, 110 N. W. 618, 12 Ann. Cas. 543; Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95.

48. Gibson v. Gibson, 67 Wash. 474, 122 P. 15; Nordlund v. Nordlund (Wash.), 166 P. 795, L. R. A. 1918A, 59; Campbell v. Campbell, 149 Mich. 147, 112 N. W. 481, 119 Am. St. R. 660; Sisemore v. Sisemore, 17 Ore. 542, 21 P. 820. *Contra,* Cowles v. Cowles, 112 Mass. 298.

"The denial of a desire so strongly implanted in human nature and an unquestioned marital privilege is the denial of that harmony and unity which lies at the very root of the marriage relation, and tends to that which renders life burdensome, and under our statute is a cruelty sufficient to satisfy the court that the parties can no longer live together." If the denial was justified "she should establish that justification." Per Morris, J., in Nordlund v. Nordlund (Wash.), 166 P. 795, L. R. A. 1918A, 59.

49. Case v. Case, 159 Mich. 491, 124 N. W. 565, 16 Det. Leg. N. 1013; Campbell v. Campbell, 149 Mich. 147, 112 N. W. 481, 14 Det. Leg. N. 284; Nordlund v. Nordlund, 97 Wash. 475, 166 P. 795.

50. See D'Aguilar v. D'Aguilar, 1 Hag. Ec. 773; Mogg v. Mogg, 2 Add. Ec. 292.

51. Pinnebad v. Pinnebad, 134 Ga. 496, 68 S. E. 73; Cowles v. Cowles, 112 Mass. 298; Platt v. Platt, 38 Pa. Super. Ct. 551; Cunningham v. Cunningham, 60 Pa. Super. Ct. 622; Varner v. Varner, 35 Tex. Civ. App. 381, 80 S. W. 386; Lohmuller v. Lohmuller (Tex. Civ. App. 1911), 135 S. W. 751; Severns v. Severns, 107 Ill. App. 141; Disborough v. Disborough (N. J. Eq.), 26 A. 852; Schoessow v. Schoessow, 83 Wis. 553, 53 N. W. 856.

52. Morehouse v. Morehouse, 70 Conn. 420, 39 A. 516; Holmes v. Holmes (Ia.), 170 N. W. 793; Carbajal v. Fernandez, 130 La. 49, 58 So. 581; Abramowitz v. Abramowitz, 140 N. Y. 275 (syphilis but not consumption); McMahen v. McMahen, 186 Pa. 485, 40 A. 795, 41 L. R. A. 802; Cook v. Cook, 32 N. J. Eq. 475; Brown v. Brown, L. R. 1 P. & D. 46; Boardman v. Boardman, L. R. 1 P. & D. 233.

CHAPTER XVII

DESERTION IN GENERAL.

SECTION 1613. Historical.
1614. Definition.
1615. Ingredients of the Offence.
1616. Distance of Departure.

§ 1613. Historical.

Desertion, or the wilful abandonment of one spouse by the other, was not a recognized cause of divorce under the ecclesiastical law of England, as promulgated at the settlement of this country. Apparently for an injured wife the suit for restitution of conjugal rights, and the sole privileges if the husband was *civiliter mortuus*, were deemed by those courts a fair substitute, while the husband, whose wife wrongfully deserted him, was perhaps as well off without a sentence of judicial separation as he would have been with one. That public policy, however, was not a solid objection to divorce on this ground, more than for cruelty, may be inferred from Godolphin's commentary,[53-54] which permitted of a new marriage as one at all events innocent, when nothing had been heard of the absent spouse for seven years.

But the English divorce statutes, with, perhaps, a disposition to place the deserted wife and deserted husband on a more equal plane, as well as to put a rational limit, adds to adultery and

53-54. "The civil and canon law do allow of divorce after a *long absence*, but are not agreed touching the time of that absence." After stating that some held two years a sufficient time, and others five years, he refers to the seven years' absence as operating much like a divorce, and adds that if the wife refuse to dwell with her Christian husband the canon law allows him to leave her. "But the truth is," says this writer, "no absence, be it for any time whatever, doth properly cause a divorce in law." Godol. Ab. 194.

cruelty, "desertion without cause for two years and upwards," as a third cause for judicial separation.[55]

Meanwhile, in most parts of the United States, where divorce is the only remedy to apply to such cases, desertion for a specified period has been a permitted cause for a divorce, perhaps for a limited divorce in the first instance; yet quite commonly, as in the case of adultery and cruelty, for a divorce, ultimately or immediately, from bonds of matrimony. The phraseology of the legislature varies in different States, as in the cause of cruelty; but "wilful desertion," "wilful absence," "wilful, obstinate, and continued desertion," or "wilful and continued desertion," appears to be the common form of expression; while as to the length of time the space of "one," "two," or "three," or even "five" years may be found stated; "three years" being, perhaps, a fair medium for legislators to reckon. On the whole, the offence appears to be the same in principle both in England and the United States, with very rare exceptions, the only statutory variation of consequence being as to the length of desertion which should perfect the right of the injured spouse.[56]

§ 1614. Definition.

Desertion in the divorce law may be defined as a voluntary separation of one party from the other without justification and without intention to return,[57] and legal desertion means an abandonment without cause, followed by separation for the statutory

55. Act 20 & 21 Vict., ch. 85, § 16.

56. "Abandonment" is the word used in some statutes, and this implies wilfully leaving the spouse with intent to cause a palpable separation; it implies, therefore, actual desertion. Stanbrough v. Stanbrough, 60 Ind. 275. As to "wilful and malicious abandonment," see Majors v. Majors, 1 Tenn. Ch. 264. And see Merrill v. Flint, 28 La. Ann. 194.

57. Mayo v. Mayo (Ala.), 74 So. 971; Todd v. Todd, 84 Conn. 591, 80 A. 717; Buckner v. Buckner, 118 Md. 101, 84 A. 156; Plymate v. Plymate, 180 S. W. 29; Rector v. Rector, 78 N. J. Eq. 386, 79 A. 295; Heyman v. Heyman, 104 N. Y. S. 227, 119 App. Div. 182; Luper v. Luper (Ore. 1908), 96 P. 1099; Merrick v. Merrick, 43 Pa. Super. Ct. 13; Crounse v. Crounse, 108 Va. 108, 60 S. E. 627.

There may be separation of husband and wife without desertion, and deser-

period,[58] wilful,[59] against the will of the other,[60] without intention on the part of the one deserting to return,[61] and mere living apart does not present an inference of desertion;[62] and the fact that the parties had not lived together as husband and wife in the usual way does not prevent evidence of desertion.[63]

tion of a wife by her husband without separation. Tipton v. Tipton (Ia.), 151 N. W. 90.

58. Trimmer v. Trimmer, 215 Ill. 121, affirming judgment (1904) 74 N. E. 96, 117 Ill. Ap. 64; Curlett v. Curlett, 106 Ill. App. 81; Perrin v. Perrin, 19 Ky. Law Rep. 296, 46 S. W. 675; Dashback v. Dashback, 62 Mich. 322, 28 N. W. 812; Ulrey v. Ulrey, 80 Mo. App. 48; Gloster v. Gloster, 48 N. Y. S. 160, 23 App. Div. 336 (driving wife from house is abandonment); State v. Luper (Ore. 1908), 95 P. 811 (wife's refusal to care for sick husband is not desertion).

59. Sterling v. Sterling (N. J.), 63 A. 548; Hull v. Hull, 14 Pa. Super. Ct, 520; Olson v. Olson, 27 Pa. Super. Ct. 128; Walker v. Walker, 120 Va. 410, 91 S. E. 180.

Wilful desertion consists in the breaking off of matrimonial cohabitation and an intent to desert. Crouch v. Crouch, 78 W. Va. 708, 90 S. E. 235.

60. Barnett v. Barnett, 27 Ind. App. 466, 61 N. E. 737; Warner v. Warner, 54 Mich. 492, 20 N. W. 557; Hall v. Hall, 77 Mo. App. 600; Meier v. Meier, 68 N. J. Eq. 9, 59 A. 234.

61. Moak v. Moak (N. J.), 48 A. 394; Burk v. Burk, 21 W. Va. 445; Tillis v. Tillis, 55 W. Va. 198, 46 N. E. 926.

62. Love v. Love (Ia.), 171 N. W. 257; Burk v. Burk, 21 W. Va. 455.

63. Brown v. Brown, 178 Ala. 121, 59 So. 48; Andrade v. Andrade, 14 Ariz. 379, 128 P. 813; Kupka v. Kupka, 132 Ia. 191, 109 N. W. 610; Hale v. Hale, 137 Ky. 831, 127 S. W. 475; Stevens v. Stevens, 123 Ky. 545, 96 S. W. 811, 29 Ky. Law Rep. 953; Taylor v. Taylor, 112 Md. 666, 77 A. 133; Heinmuller v. Heinmuller (Md.), 105 A. 745; Hubbard v. Hubbard, 127 Md. 617, 96 A. 860; Matthews v. Matthews, 112 Md. 582, 77 A. 249; Streicher v. Streicher (Mich.), 168 N. W. 409; Rebstock v. Rebstock, 144 N. Y. S. 289; Silberstein v. Silberstein, 141 N. Y. S. 376, 156 App. Div. 689; Heyman v. Heyman, 104 N. Y. S. 227, 119 App. Div. 182 (single night's absence not enough); Wilhelm v. Wilhelm (Ore.), 177 P. 57; Thompson v. Thompson, 50 Pa. Super. Ct. 159; Allen v. Allen, 194 Pa. St. 419, 45 A. 375; McConkey v. McConkey (Tex. Civ. App.), 187 S. W. 1100.

A protestation of lack of intent to separate is overcome by persistent refusal to resume the marriage relation. Fisher v. Fisher, 81 W. Va. 105, 93 S. E. 1041.

The separation and intention to abandon must concur, though the two need not be identical in their commencement. Muller v. Muller, 125 Md. 72, 93 A. 404.

When intent formed.— To constitute desertion, it is not necessary that the intent to desert should have been formed at the time the party left his

§ 1615. Ingredients of the Offence.

It may be laid down that legal desertion, in the present sense of our divorce acts, imports three things: (1) An actual cessation of cohabitation for the period specified; (2) The wilful intent of the absent spouse to desert; (3) Desertion by that spouse against the will of the other. Unless these three things concur, there is no legal desertion established such as to justify a divorce in the petitioner's favor.[64] Thus, if the husband leaves his wife in his house, and subsequently returns, with her consent, so as to see the children habitually, though he does not cohabit with her, this is not legal desertion.[65] Or, if an ill-treated wife tells her husband that either he must leave the house or else she will, his leaving her will not amount to desertion, so as to give her ground of divorce, for this is compliance with her own wishes.[66] Or, if the spouses are merely shown to have lived separate, the husband rendering no support to the wife, this is not legal desertion.[67] In short, a separation procured by artful effort, or by mutual consent, or by a ready acquiescence in a request, cannot be construed into legal desertion, so as to constitute the basis of a suit for divorce like the present; for, if it could, all discontented couples might find a way of procuring their freedom very readily, with little scandal and delay, by living apart for one, two, or three years, as the case might be.[68]

home, but it is sufficient if he afterwards determines to desert, and persist in such determination. Foote v. Foote, 71 N. J. Eq. 273, 65 A. 205.

64. Sargent v. Sargent, 33 N. J. Eq. 204; Latham v. Latham, 30 Gratt. 307; Morrison v. Morrison, 20 Cal. 431; Bailey v. Bailey, 21 Gratt. 43.

65. Taylor v. Taylor, 44 L. T. N. S. 31.

66. Kestler v. Kestler, 31 N. J. Eq. 197. If his ill-treatment amounted to cruelty or adultery, she would have ground for divorce; but where it did not, separation had no legal justification.

67. Bourquin v. Bourquin, 33 N. J. Eq. 7.

68. Cases *supra;* Cox v. Cox, 35 Mich. 461; Latham v. Latham, 30 Gratt. 307; McGowen v. McGowen, 52 Tex. 657.

§ 1616. Distance of Departure.

It is immaterial whether the spouse who in effect means to desert removes to a greater or less distance, except so far as distance might serve to illustrate the motives of either conjugal party, the test being, of course, the intent to abandon.[69]

69. Ahrenfeldt v. Ahrenfelt, 1 Hoffman, 47; Gregory v. Pierce, 4 Met. 478.

CHAPTER XVIII.

DURATION OF DESERTION.

SECTION 1617. Beginning of Desertion.
1618. Temporary Absence.
1619. Duration of Desertion.
1620. Time During Which Divorce Suit Pending.
1621. Imprisonment or Insanity.
1622. Presumption of Continuance of Desertion.
1623. Interruption of Desertion.
1624. Refusal to Renew Relations After Desertion for Statutory Period.
1625. Where Wife Leaves Country After Desertion But Before Lapse of Statutory Period.

§ 1617. Beginning of Desertion.

The beginning of the desertion is the time of actual separation and not merely the time when separation is talked about or determined on.[70]

Desertion because of the misconduct of the other party does not begin until after the offending party has in good faith exhausted all reasonable efforts to right the wrong, and to satisfy the injured spouse that there will be no recurrence of the cause which induced the separation, nor until the lapse of a reasonable time for a consideration of the overtures for a reconciliation.[71]

And as to the intent to abandon, policy requires that it continue for a certain length of time, without insisting that it commences at the precise date of separation. Thus a spouse might leave home intending to take a journey, to visit friends and the like, and, upon reflection, or while subject to sinister influences from without, conclude to permanently abandon, and act accordingly. Where such is the case, desertion commences, in the legal sense, from the

70. Trimble v. Trimble, 65 Ark. 87, 44 S. W. 1040; Middleton v. Middleton, 187 Pa. St. 612, 41 A. 291, 43 W. N. C. 33.

71. Stocking v. Stocking, 76 Minn. 292, 79 N. W. 172, 668.

time that purpose is formed by the absent spouse and acted upon, contrary, as all the circumstances may consistently indicate, to the wish of the other.[72]

§ 1618. Temporary Absence.

Temporary absence on business or pleasure in not desertion.[73]

§ 1619. Duration of Desertion.

The laws of most States require a certain period of desertion, which must be alleged and proved.[74]

The statutory period must have run before the filing of the complaint,[75] and the period of desertion is that immediately preceding the filing of the suit.[76]

Under some statutes the whole statutory period of desertion must have taken place while the libellant is living in the State where he brings his suit.[77]

Where the statute provides for action for desertion and fixes no

72. Gatehouse v. Gatehouse, L. R. 1 P. & D. 331; Hankinson v. Hankinson, 33 N. J. Eq. 66.

73. Wall v. Wall (Mich.), 162 N. W. 1001 (temporary absence not desertion); Fisher v. Fisher, 81 W. Va. 105, 93 S. E. 1041; Jones v. Jones, 13 Ala. 145; Cook v. Cook, 2 Beasley, 263; Pidge v. Pidge, 3 Met. 257; Gaines v. Gaines, 9 B. Monr. 295.

74. Reams v. Reams, 202 Ill. App. 491; Frankenburg v. Frankenberg, 190 Ill. App. 444; Pfannebecker v. Pfannebecker, 133 Ia. 425, 110 N. W. 618 (two years); Powell v. Powell (Fla.), 81 So. 105; Sanders v. Sanders (Ky.), 211 S. W. 425; Sharp v. Sharp (Ky. 1908), 113 S. W. 417; Cain v. Cain, 29 Ky. Law Rep. 1163, 96 S. W. 1113; Vercade v. Vercade, 147 Mich. 398, 110 N. W. 942, 13 Det. Leg. N. 1033; Orens v. Orens (N. J. Ch.), 102 A. 436; Hersehback v. Herschback, 81 Ore. 151, 158 P. 526; Luper v. Luper (Ore. 1908), 96 P. 1099; Little v. Little, 56 Pa. Super. Ct. 419; Dickerson v. Dickerson (Tex. Cip. App.), 207 S. W. 941; Gollehon v. Gollehon (Va.), 96 S. E. 769; Washington v. Washington, 111 Va. 524, 69 S. E. 322; Johnson v. Johnson, 85 S. E. 475; Hill v. Hill, 87 Wash. 150, 151 P. 268.

75. Bentley v. Hosmer, 110 Mich. 626, 68 N. W. 650, 69 N. W. 660, 3 Det. Leg. N. 521; Stocking v. Stocking, 76 Minn. 292, 79 N. W. 172.

76. Myles v. Myles, 77 N. J. Eq. 2651, 76 A. 1037; Getz v. Getz, 81 N. J. Eq. 465, 88 A. 376; Lake v. Lake, 89 A. 534.

77. Brand v. Brand (N. J. Ch.), 59 A. 570.

statutory period, the court should exercise its discretion under the circumstances as to the period required.[78]

§ 1620. Time During Which Divorce Suit Pending.

The *bona fide* withdrawal from cohabitation for adverse judicial proceedings, such as procuring a nullity of marriage, or bringing a libel for divorce because of the partner's adultery, is not to be alleged as legal desertion on the part of such spouse, whatever the fate of the suit, or reasonable delays attending it, for this is not wilful and wrongful;[79] and hence the time during which a suit between married persons for divorce is pending cannot be counted in reckoning the period of desertion if the divorce action was begun in good faith,[80] but not otherwise;[81] and a party whose purpose is wilful desertion cannot make legal proceedings he may have instituted furnish a fraudulent pretext for his misconduct.[82]

§ 1621. Imprisonment or Insanity.

As desertion in the legal sense must be voluntary, there is naturally some conflict in the decisions on the question whether absence

78. Etheridge v. Etheridge, 120 Md. 11, 87 A. 497; O'Farrell v. O'Farrell (Tex Civ. App. 1909), 119 S. W. 899; Bailey v. Bailey (Va.), 21 Gratt. 43.

79. Clowes v. Clowes, 9 Jur. 356; Edwards v. Green, 9 La. Ann. 317; Marsh v. Marsh, 1 McCarter, 315; Salorgne v. Salorgne, 6 Mo. App. 602.

80 Salorgne v. Salorgne, 6 Mo. App. 603, memorandum; Gruner v. Gruner, 183 Mo. App. 157, 165 S. W. 865; Weigel v. Weigel, 65 N. J. Eq. 398, 54 Atk. 1125, affg. 63 N. J. Eq. 677, 52 A. 1123; McLaughlin v. McLaughlin (N. J. Ch.), 107 A. 260 (no matter which party is petitioner in prior suit); Johnson v. Johnson, 65 N. J. Eq. 606, 56 A. 708; Weigel v. Weigel, 65 N J Eq. 398; Johnson v. Johnson, 65 N. J. Eq 606, 56 A. 708; Zeiler v. Zeiler, 58 Pa. Super. Ct. 220. See, however, Tolzman v. Tolzman, 130 Minn. 342, 153 N. W. 745.

The institution of a former suit after the wife's desertion will not prevent the running of the statutory period. Hitchcock v. Hitchcock, 15 App. D. C. 81.

The statutory period cannot begin till the entry of judgment in the former action. Hurning v. Hurning, 80 Minn. 373, 83 N. W. 342.

81. Kusel v. Kusel, 147 Cal. 52, 81 P. 297; Sutermeister v. Sutermeister (Mo. App.), 209 S. W. 955 (cross-bill not in good faith will not affect period).

82. Doyle v. Doyle, 26 Mo. 545; Simons v. Simons, 13 Tex. 468.

of a spouse in jail or in an insane asylum is such voluntary absence as to constitute legal desertion. Under some statutes time spent in prison should not be counted,[83] and in some States an action for divorce cannot be granted on the ground that the parties have lived apart for the statutory period, where the separation was caused by the confinement of the defendant in the insane asylum or in jail, as the statute implies a voluntary living apart.[84]

According to the weight of authority, however, desertion may be predicated on the absence of the husband in prison even if the statute requires voluntary absence, as the imprisonment is not without fault on his part.[85] And it has been held that though the spouse, once wilfully deserting, spend part of the time in imprisonment, serving out sentences imposed after his departure, this shall not stop the running of that period, to the prejudice of the aggrieved spouse.[86]. The time during which a spouse was insane[87] or time spent in an insane hospital cannot be counted, as it is not voluntary.[88] But where the commitment of one spouse was directly procured by the other, different considerations might arise;[89] and so, too, perhaps, where circumstances show that, despite such confinement, the deserting spouse's return to cohabitation was practicable and actually proposed. Payment of an allowance to the wife at any period after her desertion neither

83. Hyland v. Hyland, 55 N. J. Eq. 35, 36 A. 270.

84. Messick v. Messick, 177 Ky. 337, 197 S. W. 792, L. R. A. 1918A, 1184; Porter v. Porter, 82 N. J. Eq. 400, 89 A. 251; Townsend v. Townsend, L. R. Prob. N. S. 71; Hyland v. Hyland, 55 N. J. Eq. 35, 36 A. 270; Porritt v. Porritt, 18 Mich. 420.

But where the desertion is wilful the divorce may be granted although during a part of the period of desertion the defendant was confined in jail. Hews v. Hews, 7 Gray (Mass.), 279.

85. Davis v. Davis, 102 Ky. 440, 43 S. W. 168, 19 Ky. Law Rep. 1520, 39 L. R. A. 403.

86. Hews v. Hews, 7 Gray, 279.

87. Blandy v. Blandy, 20 App. D. C. 535; Douglass v. Douglass, 31 Ia. 421; Kirkpatrick v. Kirkpatrick, 81 Neb. 627, 116 N. W. 499.

88. Messick v. Messick, 177 Ky. 337, 197 S. W. 792; Gordon v. Gordon (N. J.), 105 A. 242; Porter v. Porter, 82 N. J. Eq. 400, 89 A. 251.

89. Porritt v. Porritt, 18 Mich. 420.

prevents nor stops the running of the statute.[90] Where the whole statutory period elapses before the erring spouse becomes insane the desertion is still a ground for divorce.[91]

§ 1622. Presumption of Continuance of Desertion.

As to the lapse of the statutory period of absence, a desertion once begun is presumed to continue until the contrary appears.

§ 1623. Interruption of Desertion.

Statutes authorizing divorce for desertion for a certain statutory period premise a continuous period, and two desertions cannot be added together to make up the necessary statutory time,[92] and if the wrongful desertion is interrupted even for a time by a resumption of marital relations,[93] or offer to resume them, divorce cannot be had for that cause,[94] as where the complaining party is admitted to the marital bed even if only for one night.[95]

Where the husband has been deserted by his wife for the statutory period, so that he has a complete right to a divorce for desertion, and subsequently cohabits with her voluntarily for four days, this is a complete renewal of the marriage relation between them, and if she subsequently deserted him this is merely a new act of misconduct on her part. The court holds that this is not a mere case of condonation avoided by her renewed desertion, but this is a voluntary act on the part of the libellant, which, by putting an end to the earlier desertion, made it impossible to say that any desertion had continued for the statutory period up to the filing

90. Magrath v. Magrath, 103 Mass. 577; Yeatman v. Yeatman, L. R. 1 P. & D. 489.

91. Gordon v. Gordon (N. J.), 105 A. 242.

92. Luper v. Luper (Ore. 1908), 96 P. 1099; Burk v. Burk, 21 W. Va. 445.

93. Tracey v. Tracey (N. J.), 43 A. 713.

94. Compton v. Compton, 204 Ill. App. 629; Proudlove v. Proudlove (N. J.), 46 A. 951; Wright v. Wright (Va.), 99 S. E. 515.

95. La Flamme v. La Flamme, 210 Mass. 156, declining to follow Danforth v. Danforth, 88 Me. 121. (See article by Emery, C. J., in 12 Maine Law Review, 91, in which he takes the position that the Maine court erred in the Danforth case, *supra*.)

of the libel. It was an absolute removal of the existing cause of divorce, and the fact that it involved also a forgiveness of the past wrong that had been done, cannot diminish its full effect.[96]

The practical effect of this doctrine seems to be that there can be no avoidance of a condonation in case of desertion. If the parties live together as man and wife after the desertion it makes no difference how soon the desertion is renewed; this will not revive the previous right of action for desertion.

If the statutory period was once interrupted, either because of the resumption of cohabitation by mutual assent, or the fact of an offer on the part of the deserting party to return, the computation of time stops, and a barrier is raised. Any later act of desertion must then be reckoned from the commencement of such new desertion, regardless of the prior offence; while the spouse who refuses to cohabit again, upon the other's offer to resume cohabitation, not only becomes debarred from alleging a desertion, but gives to the latter spouse the right of reckoning his or her own period as the party, in point of fact really deserted,[97] unless, upon a view of all the circumstances, there was good reason why that party should still be forbidden to return.[98]

§ 1624. Refusal to Renew Relations After Desertion for Statutory Period.

After the requisite space of time has elapsed without interruption, the right of the deserted spouse to have a divorce becomes perfect; and a refusal under such circumstances to renew cohabitation amounts to no more than insisting upon taking the course the law permits of, and having the marriage union dissolved.[99]

96. La Flamme v. La Flamme, 210 Mass. 156, 96 N. E. 62, 39 L. R. A. (N. S.) 1133. To the same effect see Williams v. Williams (1904), P. 145, 73 L. J. Prob. N. S. 31.

97. Gaillard v. Gaillard, 23 Miss. 152; Friend v. Friend, Wright, 639. Mutual treaties and deliberations with a view to resuming intercourse are inconsistent with the theory of continuous desertion. Rudd v. Rudd, 33 Mich. 101.

98. Childs v. Childs, 49 Md. 509. See *post*, as to justification in divorce.

99. Cargill v. Cargill, 1 Swab. & T. 235; Benkert v. Benkert, 32 Cal. 467.

§ 1625. Where Wife Leaves Country After Desertion but Before Lapse of Statutory Period.

Desertion for two years is not shown where the parties were married and lived abroad, and the husband left the wife, and three months later she left her home and came to this country and lived two years. He had not deserted her for two years before she left her home, and he was not bound to follow her to this country.[1]

1. Lizak v. Lizak, 67 Pittsburgh Legal Journal, 202.

CHAPTER XIX.

DESERTION: INTENT AND CONSENT.

SECTION 1626. Desertion Must Be Voluntary.
1627. Intention of Permanence.
1628. Wilful Desertion.
1629. Consent to Separation.
1630. Insisting on Separation Originally by Consent.
1631. Subsequent Separation Agreement Avoids Desertion.
1632. Duty of Deserting Spouse to Seek Renewal of Cohabitation.
1633. Duty of Deserted Spouse to Seek Renewal of Cohabitation.
1634. Offer to Return and Refusal.

§ 1626. Desertion Must Be Voluntary.

The desertion under the statute must include a voluntary cessation of cohabitation by one spouse against the will of the other.[2]

§ 1627. Intention of Permanence.

It must appear that the separation was intended to be permanent,[3] but a long absence may show determination for permanent separation.[4]

§ 1628. Wilful Desertion.

Wilful intent to desert on the part of the absent spouse must appear in the proof. And, accordingly, a libel cannot be maintained as for desertion where the complainant was the party who really deserted or was otherwise at fault in causing separation.

2. Hubbard v. Hubbard, 127 Md. 617, 96 A. 860; Porritt v. Porritt, 18 Mich. 420; Burk v. Burk, 21 W. Va. 445.

3. Chatterton v. Chatterton, 132 Ill. App. 31, judgment affirmed 231 Ill. 449, 83 N. E. 161; Boos v. Boos, 88 Mo. App. 530; Ojserkis v. Ojserkis (N. J.), 62 A. 113; Silberstein v. Silberstein, 218 N. Y. 525, 113 N. E. 495, 141 N. Y. S. 376, 156 App. Div. 689; Croll v. Croll, 60 Pa. Super. Ct. 415 (absence to care for invalid mother); Hall v. Hall, 69 W. Va. 175, 71 S. E. 103.

4. Crounse v. Crounse, 108 Va. 108, 60 S. E. 627.

Even where a wife leaves the matrimonial domicile, and returns to her father's house because of her husband's inability to provide for her support, no such desertion is constituted on his part as entitles her to ask for divorce, but she herself rather is remiss.[5] Nor is such divorce available to her where she leaves him because he gambles besides,[6] or because he lied to her.[7]

Upon the same principle of wilful desertion, a wife is held actually at fault in deserting where she left her husband on the trivial ground that he would not maintain her rightful authority as a wife over the servants.[8]

Where the statute makes "wilful and malicious desertion" a cause for divorce, a wilful desertion without cause will be sufficient, though there is no malice in fact.[9]

§ 1629. Consent to Separation.

Abandonment by one with the consent of the other does not constitute desertion, as the desertion must be against the will of the complaining party to entitle him to a divorce.[10] But where

5. Bennett v. Bennett, 43 Conn. 313.

6. Sandford v. Sandford, 32 N. J. Eq. 420.

7. Angelo v. Angelo, 81 Ill. 251.

8. Harris v. Harris, 31 Gratt. 13.

9. Wells v. Johnson, 122 La. 385, 47 So. 690; Kirkpatrick v. Kirkpatrick, 81 Neb. 627, 116 N. W. 499 (desertion must be wilfully continued); King v. King, 36 Pa. Super. Ct. 33; Hedderson v. Hedderson, 35 Pa. Super. Ct. 629; McBride v. McBride, 111 Tenn. 616, 69 S. W. 781.

10. Johnson v. Johnson, 107 Ark. 262, 154 S. W. 503; Andrade v. Andrade, 14 Ariz. 379, 128 P. 813; Silva v. Silva, 32 Cal. App. 115, 162 P. 142; Colt v. Colt, 90 Conn. 658, 98 A. 292; Ward v. Ward, 75 A. 611; Reams v. Reams, 202 Ill. App. 491; Loftus v. Loftus (Ill. App. 1907), 134 Ill. App. 360; Sanders v. Sanders (Ky.), 211 S. W. 425; Klein v. Klein, 29 Ky. Law Rep. 1042, 96 S. W. 848; Masterson v. Masterson, 20 Ky. Law Rep. 631, 46 S. W. 20; Walker v. Walker, 125 Md. 649, 94 A. 346; Foster v. Foster, 225 Mass. 183, 114 N. E. 200; Bordeaux v. Bordeaux, 43 Mont. 102, 115 P. 25; Campbell v. Campbell, 73 Mo. App. 579; Allbee v. Allbee, 38 Nev. 191, 147 P. 452; Foote v. Foote (N. J. Ch.), 61 A. 90; De Witt v. De Witt (N. J. Ch.), 36 A. 20; McGean v. McGean, 63 N. J. Eq. 285, affirming decree (Ch. 1900), 60 N. J. Eq. 21 (Ch. 1900), 49 A. 1083; Sarfaty v. Sarfaty, 59 N. J. Eq. 193, 45 A. 261; Curtin v. Curtin, 97 N. Y. S. 771, 111 App. Div. 447 (where the wife asks for support as the husband leaves her this does not

the wife had repeatedly affirmed her determination to leave the husband, the fact that when she did go he forbore to urge her further to stay to avoid a useless scene does not show his consent.[11]

It is a defence to a libel for desertion that the separation of the parties was by agreement,[12] but the fact that a wife consents to separation from a husband who ill-treats her is not a reason for denying her a divorce.[13]

§ 1630. Insisting on Separation Originally by Consent.

There is some embarrassment found, however, in applying the rule of wilful desertion to parties who have voluntarily separated in the first instance. Separation by mutual consent cannot, we have seen, be construed into legal desertion. But can one of the separating parties, by turning what was voluntary into involuntary on his or her part, fasten upon the other the wilful purpose, if the latter persist in remaining absent, and carrying out the original arrangement? According to the weight of American authority this may be done. In a New Jersey case, in fact, two parties having voluntarily separated, the one made sincere efforts after-

show consent); Powers v. Powers, 53 N. Y. S. 346, 33 App. Div. 126; Kaufman v. Kaufman, 142 N. Y. S. 1048, 158 App. Div. 892; Luper v. Luper (Ore. 1908), 96 P. 1099; Litzenberg v. Litzenberg, 57 Pa. Super. Ct. 123; Pearce v. Pearce, 53 Pa. Super. Ct. 129; Reynolds v. Reynolds, 67 Pa. Super. Ct. 465; King v. King, 36 Pa. Super. Ct. 33; Cooper v. Cooper, 37 Pa. Super. Ct. 246; Maloney v. Maloney, 83 Wash. 656, 145 P. 631 (overtures to return not made in good faith); Bacon v. Bacon, 68 W. Va. 747, 70 S. E. 762.

Where a wife, having condoned his past offences, deserted her husband, who had before told her he was willing for her to leave, but who then requested her to stay, and remained away for a number of years, refusing to see him or to return, she was guilty of wilful desertion warranting divorce. Bridge v. Bridge, 93 A. 690.

11. Nunn v. Nunn (Ore.), 178 P. 986.

12. Reams v. Reams, 202 Ill. App. 491; Barclay v. Barclay, 98 Md. 366, 56 A. 804; Lemmert v. Lemmert, 103 Md. 57, 63 A. 380; Rodgers v. Rodgers, 84 Mo. App. 197; McAllister v. McAllister (N. J. Ch. 1906), 62 A. 1131; Power v. Power, 65 N. J. Eq. 93, 55 A. 111; Beebe v. Beebe, 160 N. Y. S. 967, 174 App. Div. 408; Ogilvie v. Ogilvie, 37 Ore. 171, 61 P. 627; McCampbell v. McCampbell, 64 Pa. Super. Ct. 143.

13. Eugster v. Eugster (N. J.), 101 A. 575, 102 A. 1053.

wards to terminate that condition, but the other continued stubborn; and it was held that the stubborn party legally deserted from the time the attempt at reconciliation commenced.[14]

Much earlier a New York case decided, and upon a broader application of the doctrine, that where separation originated in mutual consent, and the husband continued to furnish support to his wife for a while, and then wrote a letter which indicated that further maintenance would be withheld by him until formal proceedings were had for divorce, the husband deserted in fact, his desertion beginning not later than the time when that letter was written.[15]

In one or two cases, however, the view is taken rather that where spouses have once voluntarily separated, wilful desertion cannot be predicated afterwards of either party who is content to continue absent as originally agreed upon.[16] To this latter view Mr. Bishop does not subscribe; and he refers properly to the suit for restitution of conjugal rights by way of suggesting that, even if such were the English rule, American courts would, with less reason, adopt it, inasmuch as complainants in American courts could not have recourse to that remedy for breaking up the arrangement to live apart.[17]

"A consent to a separation," says this writer, "is a revocable act; and if parties separate by consent, and one of them afterward, in good faith, seeks a reconciliation, but the other refuses to return; or if they separate for cause, and the cause is removed, but one of them declines to renew the cohabitation; or if a wife, having left her husband without cause, comes back to him, and he will not receive her; or if the husband, after deserting his wife, proposes to renew the cohabitation, and she rejects his proposal, the full

14. Hankinson v. Hankinson, 33 N. J. Eq. 66.

15. Ahrenfeldt v. Ahrenfeldt, 1 Hoffman, 47. The circumstances do not very clearly appear in the report of this case.

16. Fitzgerald v. Fitzgerald, L. R. 1 P. & D. 694, per Lord Penzance; Cooper v. Cooper, 17 Mich. 205.

17. Perhaps the English rule does not differ so greatly from that preferred in the text. See Gatehouse v. Gatehouse, L. R. 1 P. & D. 331.

statutory period not having elapsed; this is a desertion, by the one refusing, from the time of the refusal. But to entitle a person to a divorce under such circumstances, the offer of return must be made in good faith, it must be free from improper qualifications and conditions, and it must be really intended to be carried out in its spirit if accepted. And in all cases the legal desertion ends with the intent to desert; for instance, it ends when the erring party undertakes to come back and is prevented. If the wife is restrained by her parents from rejoining her husband, the court, on proper application, will remove the restraint."

The more recent cases show that it may be a desertion for one wrongfully to prolong a desertion which was not originally a cause for divorce, as where a wife is deserted by her husband and she fails to sue for a divorce for many years and refuses to resume marital relations,[18] or where the wife leaves her husband's home with the intention of returning and subsequently refuses his request to return.[19]

Where the separation was originally by mutual consent there must be evidence that the consent was withdrawn and that one of the parties demanded a return of marital duties to render it desertion[20] as understood in divorce within the statutory

18. McMullin v. McMullin, 140 Cal. 112, 73 P. 808, reversing 71 P. 108.

19. Burk v. Burk, 21 W. Va. 445 (desertion dates from refusal to return).

20. McConnell v. McConnell, 98 Ark. 193, 136 S. W. 931; Borden v. Borden, 166 Cal. 469, 137 P. 27; Woolard v. Woolard, 18 App. D. C. 326 (offer in reproachful letter insufficient); Seeds v. Seeds, 139 Ia. 717, 117 N. W. 1069; Fagan v. Fagen (Ia.), 173 N. W. 875; Holschback v. Holschback (Mo. App.), 184 S. W. 155; Provost v. Provost (N. J. Ch. 1906), 63 A. 619; Gates v. Gates, 59 N. J. Eq. 100, affd. (1900) 60 N. J. Eq. 486, 4 A. 436; Power v. Power, 66 N. J. Eq. 320, 58 A. 192; Currier v. Currier, 68 N. J. Eq. 7, affd. (1905) 68 N. J. Eq. 797, 59 A. 4, 64 A. 1133; Jones v. Jones, 93 A. 580, affirming decrees (Ch.) 82 N. J. Eq. 558, 89 A. 29, and (Ch.) 83 N. J. Eq. 571, 91 A. 819; Hague v. Hague, 96 A. 579, reversing decree (Ch.) 84 N. J. Eq. 674, 95 A. 192; Dennison v. Dennison, 102 N. Y. S. 621, 52 Misc. 37; Herschback v. Herschback, 81 Ore. 151, 158 P. 526; Kurniker v. Kurniker, 54 Pa. Super. Ct. 196; McBrien v. McBrien, 63 Pa. Super. Ct. 576; Whelan v. Whelan, 183 Pa. St. 293, 38 A. 625.

Mere lapse of time does not cause

period.[21] And where the wife, who has wilfully deserted, repents, and it is her husband's compulsory conduct, not her own obstinacy, which causes the absence to continue further for the statutory period, the husband is not entitled to a divorce.[22]

A husband deserts, in the legal sense, where he leaves his wife, promising to return presently, and then fails to return, though requested and promising to do so; and here the statutory period having expired while he continues absent, the wife may have her divorce.[23]

A separation followed by repeated negotiations for return to each other is not an abandonment within the statute.[24]

A hasty request or permission to depart is not conclusive against the spouse deserted. As to the wife, for instance, it is held that if she tells the husband to go his way, and then immediately retracts, and yet he in a passion leaves her, makes no later attempt at reconciliation, contributes nothing to her support, communicates nothing, and gives no opportunity for a return of domestic harmony, she may procure her divorce for his desertion at the expiration of the statute period.[25]

§ 1631. Subsequent Separation Agreement Avoids Desertion.

What may have been desertion in its inception may by later consent within the statutory period cease to be a ground for divorce,[26] and where there was a written agreement for separation this interrupts the period of desertion even though the agreement

a desertion without culpability in its inception to ripen it into one of wilfulness. Topfer v. Topfer (N. J. Ch. 1907), 68 A. 1071.

21. McMullin v. McMullin, 140 Cal. 112, 71 P. 108, reversed (1903) 7 P. 808 (not after eighteen years).

22. Bowlby v. Bowlby, 25 N. J. Eq. 406.

23. Brinkerhoff v. Brinkerhoff, 29 N. J. Eq. 132.

24. Simon v. Simon, 159 N. Y. 549, 54 N. E. 1094.

25. Schanck v. Schank, 33 N. J. Eq. 363. See also Childs v. Childs, 49 Md. 509.

26. Olson v. Olson, 27 Pa. Super. Ct. 128; King v. King, 36 Pa. Super. Ct. 33. See, however, Pettis v. Pettis, 91 Conn. 608, 101 A. 13.

was at once revoked,[27] but acquiescence in the absence of the other because of a fear that he would resume his cruelty does not bar an action for divorce,[28] and the fact that the libellant had filed a prior libel for cruelty shows that she does not wish to live with the defendant and requires dismissal of the libel for desertion.[29]

A divorce for wilful and malicious desertion will be refused where it appears that since the desertion by the wife with her children the husband has sent her money for support and the parties have agreed on the terms of settlement in case a divorce were granted. A deserted party cannot have a divorce who quietly and with resignation accepts the situation and in a polite way aids the deserting spouse and renders her condition easy and pleasant by furnishing means of maintenance or taking any other steps to render the litigation mutually satisfactory.[30]

§ 1632. Duty of Deserting Spouse to Seek Renewal of Cohabitation.

It is the duty of the deserting spouse to return within the statutory period, and in case he does or makes proper overtures for renewal of conjugal relations this cures the desertion,[31] but a return after the statutory period will not suffice.

27. Silva v. Silva (Cal. App.), 162 P. 142.

28. Wilson v. Wilson, 66 N. J. Eq. 237, 57 A. 552; Leonard v. Leonard, 67 Pa. Super. Ct. 412.

29. Najjar v. Najjar, 227 Mass. 450, 116 N. E. 808.

30. Wengrovius v. Wengrovius, 67 Pittsburgh Legal Journal, 393.

31. McMullin v. McMullin, 123 Cal. 653, 56 P. 544; Stoneburner v. Stoneburner, 11 Idaho, 603, 83 P. 938; Paul v. Paul, 75 Ill. App. 383; Conlin v. Conlin, 163 Ia. 420, 144 N. W. 1005; McElhaney v. McElhaney, 125 Ia. 333, 101 N. W. 93; Messenger v. Messenger, 56 Mo. 329 (offer must be made in good faith); Brand v. Brand (N. J. Ch. 1904), 59 A. 570; Meier v. Meier, 68 N. J. Eq. 9, 59 A. 234; Loux v. Loux, 57 N. J. Eq. 561, 41 A. 358; Ogilvie v. Ogilvie, 37 Ore. 171, 61 P. 627; Wilhelm v. Wilhelm (Ore.), 177 P. 57 (offer to return); Neagley v. Neagley, 59 Pa. Super. Ct. 565; McGowan v. McGowan (Tex. Civ. App. 1899), 50 S. W. 399; Johnson v. Johnson (Tex. Civ. App. 1907), 102 S. W. 943.

Where a wife had frequently deserted her husband, it cannot be assumed that the husband's failure to

It may be a defence to the wife's action for her to leave her husband and write him that she would never again live with him,[32] but her refusal, pending divorce proceedings, to resume relations with him is no ground for denial of relief to her.[33]

§ 1633. Duty of Deserted Spouse to Seek Renewal of Cohabitation.

Cases go so far in their opposition to a voluntary separation as to require active effort on the part of the deserted spouse to induce the erring one to return, wherever opportunity for such inducement existed, and the act of desertion was not committed under heinous circumstances. Thus, a husband's petition for divorce on the ground of desertion has been refused, where it appeared that the wife would have returned had he invited her to do so, and he took no pains to bring her back.[34] So a divorce for wilful and obstinate desertion should not be granted where the wife leaves the husband and returns to her parents, where a child is born, and the husband fails to do anything to induce her to return or to do anything to take care of his child.[35]

The essence of the wrong of desertion by the wife consists in her

become reconciled, immediately upon his wife's offer to return after leaving him, was a wilful desertion by him. Epley v. Epley, 83 N. J. Eq. 214, 89 A. 1028.

A deserted spouse cannot prevent the other from terminating the period of desertion, so as to prevent the acquisition of a ground for divorce, by refusing to resume marital relations; but, when the desertion has continued through the statutory period, the deserted one may rely upon his acquired right and refuse to renew cohabitation. Luper v. Luper (Ore. 1908), 96 P. 1099.

Where the court in a suit by a wife for divorce on the ground of cruelty determined that the husband was not at fault, it became the duty of the wife, who had left her husband's home, to return to the home and demand the support to which she was entitled before she could maintain a suit for abandonment subsequently accruing. Stay v. Stay, 53 Wash. 534, 102 P. 420.

32. Speiser v. Speiser, 188 Mo. App. 328, 175 S. W. 122.

33. Tipton v. Tipton, 169 Ia. 182, 151 N. W. 90.

34. Thorpe v. Thorpe, 9 R. I. 57. and see Mayer v. Mayer, 30 N. J. Eq. 411.

35. Hill v. Hill (Fla.), 56 So. 941, 39 L. R. A. (N. S.) 1117.

refusing to live with her husband when he wants her to live with him. When a husband, not entirely blameless for the act, makes no effort to prevent his desertion by his wife, and acquiesces in and appears satisfied with its continuance, he is not entitled to a divorce on the ground of desertion.

Marital duty requires even an aggrieved spouse to repair rather than widen the breach when slight differences have arisen, and generously to pardon an error hastily committed, if trivial of itself, and followed quickly by repentance. Especially does this hold true of a husband's conduct towards his wife; for to encourage a woman, ever so slightly, to withdraw from the protection of the home, is to invite her irretrievable ruin; his judgment should be sounder than hers, and in this respect the measure of his generosity should be ampler.

It is not to be insisted upon, however, that the spouse who is in the right, even though the stronger, shall yield to the weaker, if the latter deliberately and persistently fails in the conjugal duties, or sacrifice self-respect in the effort to bring back the erring. Hence, a husband, whose wife has deserted him without cause, and remains away after full opportunity to realize the folly of her act, need not attempt to induce her to return when it is clear that the effort to do so would be unavailing; and in due time he may procure his decree.[36]

If a wife wilfully deserts her husband he is under no legal obligation to attempt to induce her to return,[37] and he is not bound

36. Trall v. Trall, 32 N. J. Eq. 231.

37. Hitchcock v. Hitchcock, 15 App. D. C. 81; Seeds v. Seeds, 139 Ia. 717, 117 N. W. 1069; Fisler v. Fisler (N. J.), 95 A. 970; Lister v. Lister, 65 N. J. Eq. 109, 55 A. 1093, affd. 66 N. J. Eq. 434, 57 A. 1132 (where it is obvious that any effort to induce her to return would be fruitless); Patterson v. Patterson, 45 Wash. 296, 88 P. 196; *contra*, Wood v. Wood, 63 N. J. Eq. 688, 53 A. 51. See Van Horn v. Arantes, 116 La. 130, 40 So. 592 (where by statute three summons to return required).

The failure of a husband to attempt to induce his wife to return to him removes from her desertion the element of obstinacy, and such desertion is not a ground for divorce under a statute providing that to render a desertion ground for divorce the de-

to attempt to induce her to return if it is clear that any such effort will be unavailing.[38] So where the wife leaves the husband and offers to return only on condition that he shall give her more money and let her pay the household bills, and that they shall have separate rooms, and takes away the furniture in his absence and sues him for alimony, this shows such settled determination to leave him that any overtures made by the husband to induce her to return would have been entirely futile, and he is excused from making them.[39]

If her desertion, however, is on account of his unkind treatment, it is his duty to make advances in a sincere effort to induce her to return, and only in case of her refusal does her absence become desertion,[40] and the wife's desertion is not obstinate where the separation is partly the fault of the husband and he makes no

sertion must have been wilful, continued, and obstinate. Taylor v. Taylor, 108 Md. 129, 70 A. 323.

38. Marsh v. Marsh, 86 N. J. 419, 99 A. 409; Fry v. Fry (N. J. Ch.), 100 A. 839.

39. Rogers v. Rogers (N. J.), 86 A. 935, 46 L. R. A. (N. S.) 711.

40. Shine v. Shine (Mo. App.), 189 S. W. 403; Cole v. Cole, 93 A. 708; Ojserkis v. Ojserkis (N. J. Ch. 1905), 62 A. 113; Jerolaman v. Jerolaman (N. J. Ch. 1903), 54 A. 166; Spille v. Spille, 68 N. J. Eq. 647, 61 A. 742; Crickler v. Crickler, 53 N. J. Eq. 427, 43 A. 1064; Hall v. Hall, 59 N. J. Eq. 402, decree modified 60 N. J. Eq. 469, 46 A. 866; Lister v. Lister, 65 N. J. Eq. 109, 55 A. 1093, affd. 66 N. J. Eq. 434, 57 A. 1132.

There is no hard and fast rule. (Ch.) Rogers v. Rogers, N. J. Eq. 311, 88 A. 370, decree reversed (Err. & App.) 81 N. J. 479, 86 A. 935, 46 L. R. A. (N. S.) 711.

A desertion can only be adjudged obstinate within the statute relating to divorce when it has resisted such efforts or concessions as the party alleging desertion ought, under the particular circumstances, to have made to prevent it or to bring it to an end, though the conduct of the deserting party may be of such a nature that the desertion will be deemed obstinate without any effort on the part of the deserted party to prevent or terminate it. Kipp v. Kipp, 77 N. J. Eq. 585, 78 A. 682. See Purnell v. Purnell (N. J. 1908), 70 A. 187 (if it appears that an honest effort at reconciliation will be fruitless the husband need not make it).

Unwise attempt at reconciliation. Where it appeared that defendant, without sufficient cause, abandoned the common domicile, it was no defence that the husband may have pursued an unwise course in attempting to induce her to return. Wheeler v. Britton, 134 La. 63, 63 So. 624.

attempt to effect a reconciliation.[41] Hence it is no bar to the wife's suit for divorce for the husband's desertion that she did not desire him to return where her feelings were the result of his cruel treatment of her.[42]

The wife is not bound by the same rule as the husband, requiring her to invite her deserting spouse to return.[43]

§ 1634. Offer to Return and Refusal.

Where the wife leaves the husband's house and then offers to return, and he refuses to take her back, he is guilty of desertion,[44] or is away for a short period and wants to come back,[45] and it may be said in general that if the deserting party in good faith offers to return, and the offer is refused this is desertion on the part of the other party who refuses.[46]

Refusal by a wife of an offer made in good faith for reconciliation is desertion, although she has been granted separate maintenance,[47] but a colorable offer to return is not sufficient to terminate the desertion.[48]

41. Wright v. Wright (N. J. Ch. 1899), 43 A. 447; Sarfaty v. Sarfaty, 59 N. J. Eq. 193, 45 A. 261; Van Wart v. Van Wart, 57 N. J. Eq. 598, 41 A. 965; Grover v. Grover, 63 N. J. Eq. 771, 50 A. 1051; Edwards v. Edwards, 69 N. J. Eq. 522, 61 A. 531; Middleton v. Middleton, 187 Pa. St. 612, 41 A. 291, 43 W. N. C. 33.

42. Bovaird v. Bovaird, 78 Kan. 315, 96 P. 666; Martin v. Martin, 78 N. J. Eq. 423, 79 A. 261; Smith v. Smith, 55 N. J. Eq. 222, 37 A. 49; McKinney v. McKinney, 87 S. E. 928.

43. Fielding v. Fielding, 64 So. 546; Coe v. Coe, 68 N. J. Eq. 157, 59 A. 1059; Wilson v. Wilson, 66 N. J. Eq. 237, 57 A. 552.

44. Tutwiler v. Tutwiler, 118 Va. 724, 88 S. E. 86.

45. Saillard v. Saillard, 2 Tenn. Ch. App. 396.

46. Peretti v. Peretti, 165 Cal. 717, 134 P. 322; Buckner v. Buckner, 170 Ill. App. 314 (injunction against going to husband's office is not preventing her from returning); Silverstein v. Silverstein, 178 Ill. App. 145; Womble v. Womble (Tex. Civ. App.), 152 S. W. 473.

47. Appleton v. Appleton, 97 Wash. 199, 166 P. 61.

48. Walker v. Walker, 14 Cal. App. 487, 112 P. 479; Hunt v. Hunt, 61 Fla. 630, 54 So. 390; Seeds v. Seeds, 139 Ia. 717, 117 N. W. 1069; Bohanan v. Bohanan, 150 Ia. 182, 129 N. W. 819; Arment v. Arment, 154 Ia. 573, 134 N. W. 616 (offer must be free from improper conditions); Creasey v. Creasey, 168 Mo. App. 68, 151 S. W. 219.

CHAPTER XX.

EVIDENCE OF DESERTION.

SECTION 1635. Cruelty or Adultery as Desertion.
1636. Denial of Sexual Intercourse.
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§ 1635. Cruelty or Adultery as Desertion.

Cruelty which will warrant divorce and forces separation may constitute desertion,[49] but proof of adultery is not proof of statutory desertion.[50]

§ 1636. Denial of Sexual Intercourse.

The mere refusal to have sexual intercourse with the spouse may constitute desertion,[51] but not in most States where the parties are

49. Day v. Day, 5 Alaska, 584; Rigsby v. Rigsby, 82 Ark. 278, 101 S. W. 727; Hudson v. Hudson, 59 Fla. 529, 51 So. 857; Walker v. Walker, 64 Fla. 536, 59 So. 898; Dowdy v. Dowdy, 154 N. C. 556, 70 S. E. 917; Setzer v. Setzer, 128 N. C. 170, 38 S. E. 731, 83 Am. St. Rep. 666; Matthews v. Matthews (N. J. Ch.), 107 A. 480; G—— v. G——, 67 N. J. Eq. 30, 56 A. 736; Mossa v. Mossa, 107 N. Y. S. 1044, 123 App. Div. 400; Howe v. Howe, 16 Pa. Super. Ct. 193; Davenport v. Davenport, 106 Va. 736, 56 S. E. 562.

50. Tracy v. Tracy (N. J. Ch. 1899), 43 A. 713; Lake v. Lake, 65 N. J. Eq. 544, 56 A. 296.

51. Fink v. Fink, 137 Cal. 559, 70 P. 628; Hayes v. Hayes, 144 Cal. 625, 78 P. 19; Pinnebad v. Pinnebad, 134 Ga. 496, 68 S. E. 73 (only if continued for three years); Axton v. Axton (Ky.), 206 S. W. 480; Graves v. Graves, 88 Miss. 677, 41 So. 384;

living together,[52] but not where her physical condition will not allow intercourse safely, and the mere fact that the husband and wife sleep in separate beds or separate rooms is no legal evidence of abandonment.[53]

§ 1637. Abandonment as Ground for Separation.

Abandonment may be a distinct ground for separation,[54] and the absence of the husband from the State without providing for her will justify the wife in a separation for abandonment.[55]

§ 1638. Non-Support.

Living apart from the wife without supporting her or letting her know where he is, and living with another woman, is evidence

Raymond v. Raymond, (N. J. Ch. 1909), 79 A. 430. (A spouse's wilful refusal to engage in sexual intercourse is desertion under the statute, making desertion ground for divorce, and hence, where a husband refused to consummate the marriage by sexual intercourse, he deserted his wife, even though he supported her, and they lived under the same roof.)

Parmly v. Parmly (N. J. Ch.), 106 A. 456.

Contra, Pratt v. Pratt, 75 Vt. 432, 56 A. 86; Whitfield v. Whitfield, 89 Ga. 471, 15 S. E. 543; Pinnebad v. Pinnebad, 134 Ga. 496, 68 S. E. 73; Rector v. Rector, 78 N. J. Eq. 404, 79 A. 295. See Oertel v. Oertel (N. J. Eq.), 90 A. 1006 (not where the husband fails to support the wife).

A husband who deserted his wife is not in a position to insist on a divorce because she declined to assume marital relations with him on request. Bovaird v. Bovaird, 78 Kan. 315, 96 P. 666.

If the husband refuses to remove, by the aid of medical skill, a curable impediment to the consummation of the marriage, and such refusal is persisted in against the wishes of the wife, he is guilty of matrimonial desertion. Yawger v. Yawger (N. J.), 86 A. 419.

52. Keesey v. Keesey, 160 Cal. 727, 117 P. 1054; Prall v. Prall, 58 Fla. 496, 50 So. 867; Pfannebecker v. Pfannebecker, 133 Ia. 425, 110 N. W. 618; Snouffer v. Snouffer, 150 Ia. 58, 129 N. W. 326; Lambert v. Lambert, 145 N. W. 920; Williams v. Williams, 121 Mo. App. 349, 99 S. W. 42; Wacker v. Wacker, 55 Pa. Super. Ct. 380; Pratt v. Pratt, 75 Vt. 432, 56 A. 86; Schoessow v. Schoessow, 83 Wis. 553, 53 N. W. 856.

53. Burton v. Burton (Ky.), 211 S. W. 869.

54. Drummond v. Drummond, 171 N. Y. S. 477.

55. Wilcox v. Nixon, 115 La. 47, 38 So. 890, 112 Am. St. R. 266.

of wilful desertion,[56] as is absence for a number of years with failure to support.[57]

Wilful desertion may be shown by various acts of cruelty accompanied by failure to provide and abandonment,[58] but not by even failure to support if it appears that the parties had not ceased communication with each other.[59] Non-support when coupled with neglect will be ground for separation,[60] and failure of the husband to provide a suitable home and support is justification to the wife in leaving him,[61] but mere non-support does not warrant the wife in leaving her husband and suing for divorce on the ground of desertion,[62] and ability to provide must be shown.[63]

The husband's conduct may be such that a demand and refusal to support may be inferred.[64]

§ 1639. Non-Support as Reason for Desertion.

The husband cannot obtain a divorce for desertion for her act in

56. Searcy v. Searcy, 196 Mo. App. 311, 193 S. W. 871; Carroll v. Carroll, 68 N. J. Eq. 724, 61 A. 383.

57. Cowen v. Cowen (N. J. Ch.), 106 A. 366; Clemans v. Western, 39 Wash. 290, 81 P. 824.

58. De Armond v. De Armond, 66 Ark. 601, 53 S. W. 45; Curlett v. Curlett, 106 Ill. App. 81; Fagan v. Fagan (Ia.), 173 N. W. 875; Whinyates v. Whinyates (N. J. Ch. 1898), 41 A. 363.

Where complainant was not living with her husband at the time he uttered certain threats and committed certain acts of violence against her this was not desertion. Corson v. Corson, 69 N. J. Eq. 513, 61 A. 157.

59. Reed v. Reed, 62 Ark. 611, 37 S. W. 230; McDonough c. McDonough (D. C. 1902), 20 App. D. C. 46; Hitzeman v. Hitzeman, 106 Ill. App. 459; Embley v. Embley (N. J. Ch. 1897), 37 A. 46 (where husband unable to provide); Howell v. Howell, 64 N. J. Eq. 191, 48 A. 510, reversing 63 N. J. Eq. 293, 49 A. 586. See Coe v. Coe, 68 N. J. Eq. 157, 59 A. 1059 (where dissipated husband cannot find work and merely writes affectionate letters he is a deserter).

60. Dennison v. Dennison, 102 N. Y. S. 621, 52 Misc. 37; Finkelstein v. Finkelstein, 161 N. Y. S. 166, 174 App. Div. 416.

61. Bell v. Bell, 15 Idaho, 7, 96 P. 196; Oertel v. Oertel, 83 N. J. Eq. 39, 90 A. 1006 (wife's refusal of sexual intercourse justified by husband's failure to provide).

62. Farrier v. Farrier (N. J. Ch. 1904), 58 A. 1079.

63. Corson v. Corson, 69 N. J. Eq. 513, 61 A. 157.

64. Hardy v. Eagle, 54 N. Y. S. 1045, 25 Misc. 471.

leaving him because of his inability to support her, where she is willing to return as soon as he showed any ability to support her properly.[65] But where she leaves him because he is not able to support her in the style to which she is accustomed, and does not intend to return, this is desertion.[66]

A statute providing for divorce for non-support does not apply where the husband's failure to provide arises from the mental or physical disease of the husband,[67] and it is not desertion on the part of the husband where he is turned out of her father's house and is unable to furnish his wife a home.[68]

Where the wife consents to a separation due to the inability of the husband to furnish a family domicile this is not a desertion.[69]

§ 1640. Support of Deserted Wife.

The fact that the deserting husband supports his wife during her absence is not a bar to her action for divorce for desertion,[70] and there is an abandonment where the husband ceases to live with his wife although he continues to provide for her.[71]

§ 1641. Wife's Refusal to Live in Home Provided.

Since the husband has the right to choose the matrimonial domicile, according to the principles of universal law, elsewhere dwelt upon,[72] the wife's persistent and continued refusal, without full justification, to live with her husband at the place honestly and rationally selected by him for the family abode, constitutes legal desertion on her part, and entitles him to a divorce.[73]

65. Bell v. Bell, 15 Idaho, 7, 96 P. 196; Belden v. Belden, 33 N. J. Eq. 94.

66. Freeman v. Freeman, 94 Mo. App. 504, 68 S. W. 389.

67. Baker v. Baker, 82 Ind. 146.

68. Sarson v. Sarson, 74 N. J. Eq. 564, 70 A. 663.

69. Lewis v. Lewis, 167 Cal. 732, 141 P. 367, 52 L. R. A. (N. S.) 675.

70. Elzas v. Elzas, 171 Ill. 632, 49 N. E. 717; Gates v. Gates, 60 N. J. Eq. 486, 46 A. 1100; Power v. Power, 66 N. J. Eq. 320, 58 A. 192, 105 Am. St. R. 653. See, however, G—— v. G——, 67 N. J. Eq. 30, 56 A. 736.

71. Tabor v. Tabor, 140 N. Y. S. 313, order affirmed 141 N. Y. S. 1148, 156 App. Div. 892; Brokaw v. Brokaw, 123 N. Y. S. 17, 66 Misc. 307.

72. *Supra*, § 41.

73. Hunt v. Hunt, 29 N. J. Eq. 96;

It is not desertion by the husband where the wife refuses to live in the home he provides for her, her duty being to accept the situation her husband is able to maintain.[74]

§ 1642. Wife's Refusal to Live with Husband's Parents.

It is often held that it is not desertion for the wife to refuse to live with the husband's parents.[75] "The unexplainable dislike, sometimes, of husbands, as well as wives, for their mothers-in-law, is a part of the history and traditions of our race, and, though usually such dislike is foolish and unwarranted, each will have an opinion upon this subject somewhat in accordance with his experiences." [76]

It does not constitute a cause for divorce for desertion that the wife leaves the husband rather than live with him at his parents' home with his parents, with whom she is living unhappily, especially where the parents are well able financially to have a home of their own. A just and affectionate husband should not confront his wife with a decision of either living unhappily with him at his parents' home or living separate and apart from him at another place.[77] "It is the duty of the husband to provide a home for his wife, where she is recognized by its inmates as the household mistress, and when the husband subjects his wife in the management of her household affairs to the interference of his mother, and by words and acts assails her conduct and reputation to such an extent that she cannot endure it, and leaves the home for that

Walton v. Walton, 114 Ill. App. 116; Gains v. Gains, 26 Ky. Law Rep. 471 (wife tired of farm life); Ashburn v. Ashburn, 101 Mo. App. 365, 74 S. W. 394; Finkelstein v. Finkelstein, 161 N. Y. S. 166, 174 App. Div. 416.

74. Roby v. Roby, 10 Idaho, 139, 77 P. 213; Provost v. Provost (N. J. Ch. 1906), 63 A. 619.

75. Marshak v. Marshak, 170 S. W. 567; Garrison v. Garrison, 31 Ky. Law Rep. 1209, 104 S. W. 980; Geisinger v. Conners, 130 La. 922, 58 So. 815; Field v. Field, 139 N. Y. S. 673, 79 Misc. 557; Reynolds v. Reynolds, 62 Pa. Super. Ct. 280. See Klein v. Klein, 29 Ky. Law Rep. 1042, 96 S. W. 848.

76. Kelly v. Kelly (Ky.), 209 S. W. 335.

77. Marshak v. Marshak (Ark.), 170 S. W. 567, L. R. A. 1915E, 161.

reason, her desertion may be wilful, but it does not become obstinate" unless, after a *bona fide* attempt to effect a reconciliation, the wife refuses to return. The husband proves no such *bona fide* attempt by merely showing that he has written two letters to his wife offering her a home under the old conditions. In this case it appeared that in the quarrels between the two women the husband had either remained neutral or taken the part of his mother, and has never visited his wife since her separation, although living in the same city. Therefore the husband cannot obtain a divorce for desertion.[78]

§ 1643. Wife's Refusal to Follow Husband in Change of Domicile.

It is desertion for the wife to refuse to follow the husband in his change of domicile,[79] to a suitable home,[80] only if the husband requests her to follow him,[81] but not where the husband does not provide a proper home at his new domicile.[82]

The husband will not be granted a divorce for desertion where

78. Fraser v. Fraser (N. J.), 101 A. 58, L. R. A. 1917F, 738.

79. Winkles v. Powell, 173 Ala. 46, 55 So. 536; Roby v. Roby, 10 Idaho, 139, 77 P. 213; Coleman v. Coleman, 164 Ky. 709, 176 S. W. 186; Martin v. Martin, 133 La. 948, 63 So. 477; Franklin v. Franklin, 190 Mass. 349, 77 N. E. 48, 4 L. R. A. (N. S.) 145; Schuman v. Schuman, 93 Mo. App. 99; Roberson v. Roberson (Nev.), 169 P. 333; Calichio v. Calichio, 96 A. 658; Appleby v. Appleby (N. Y. Sup. 1883), 2 McCarty Civ. Proc. 422; De Vry v. De Vry, 148 P. 840; State v. Luper (Ore. 1908), 95 P. 811; Buell v. Buell, 42 Wash. 277, 84 P. 821; Burk v. Burk, 21 W. Va. 445.

A wife cannot establish desertion on the husband's part by proof that he refuses to comply with her demands relative to his habits and manner of supporting her, her duty being to accept the situation that her husband is able to maintain. Decree (Ch. 1906) 63 A. 619, affd.; Provost v. Provost, 73 N. J. Eq. 418, 75 A. 1101.

80. Bibb v. Bibb (Cal. App.), 179 P. 214.

81. While it is the duty of a wife to submit to her husband's choice of family domicile, she is not bound to follow him unless it is his wish that she do so, and if he does not request her to accompany him she is not guilty of desertion. Collett v. Collett, 170 Mo. App. 590, 157 S. W. 90.

82. Kenniston v. Kenniston, 6 Cal. App. 657, 92 P. 1037; King v. King, 122 La. 582, 47 So. 909; Copping v. Termini, 135 La. 224, 65 So. 132;

the wife refuses to follow him to a new home and leave the double house where they are living, in the other half of which her mother is living and helping her with the work and with the household expenses, where the wife is so ill that she cannot run the house without help and the husband has no means to pay for it. The court remarks that while it is true that as a rule the wife must follow the husband and accept the home that he offers her, still, where she is unable physically and mentally to assume the care of a home, there is no law, human or divine, which justifies him in requiring her to attempt the impossible or which imposes upon her the obligation to leave a mother who is able and willing to afford her that aid and comfort which her husband's means do not enable him to afford.[83]

A refusal of a wife of an officer in the army to follow her husband to another State, to which he has been ordered by his superior officers, is desertion for which he may obtain divorce.[84] So, too, where they have lived at her father's house, and the husband, upon provocation from her father, or for some other just cause, leaves the house, and requests his wife to accompany him, she ought to do so, and, at the least, her persistent refusal to obey him debars her from construing his consequent absence into legal desertion.[85] Mere refusal to agree to a new home is not enough. There must be an actual acquisition of a new domicile and her refusal to go to it.[86]

§ 1644. Forcing Spouse to Leave.

It does not follow necessarily, according to the current of divorce precedents, that the party who deserts, in the legal sense, withdraws as of course from the matrimonial abode; for one who wil-

Horn v. Horn, 17 Pa. Super. Ct. 486. See Tegethoff v. Tegethoff (Mo. App.), 199 S. W. 460.

83. Copping v. Termini (La.), 65 So 132, L. R. A. 1915A, 222.

84. Stevens v. Allen (La.), 71 So. 936, L R. A. 1916E, 1115.

85. Mayer v. Mayer, 30 N. J. Eq. 411.

86. Vosburg v. Vosburg, 136 Cal. 195, 68 P. 694; King v. King (La.), 47 So. 909; Devers v. Devers, 115 Va. 517, 79 S. E. 1048.

fully and wrongfully draws the matrimonial abode away from the other, so to speak, while remaining in it alone, becomes amenable to that charge; it is enough to have discontinued cohabitation wilfully and without justification.[87] Stratagem will not here avail more than violence in producing so unhappy a state of things, for it is blame in either spouse as to bringing about the separation that the law chiefly regards.[88] This, however, is not tantamount to declaring that cruel treatment by one spouse, whatever that spouse may have intended, constitutes desertion of the other, so that there arises of necessity a choice of grounds; but that, when carried so far that the latter spouse has to leave, the circumstances will raise a presumption that the cruel partner thereby purposed bringing about the separation, which presumption his acquiescence afterwards in the continuous absence will render almost conclusive against him.[89] Probably, if both spouses were shown equally at fault in producing the separation, neither could claim a divorce.[90]

If the wife leaves the matrimonial abode because of the husband's gross misconduct, his personal violence, coarse abuse or threats, and persistent neglect of duty, whatever her rights, he cannot avail himself of her departure as legal desertion so as to obtain a divorce on his own application.[91]

Furthermore, if he drives his wife from the house by cruel treatment, it is not enough that she may allege cruelty in her libel, but this is frequently held to constitute, besides, the offence of legal desertion on his part.[92]

87. Meldowney v. Meldowney, 27 N. J. Eq. 328; Harding v. Harding, and other authorities cited in note preceding. As to wrongfully turning a wife out of doors, see also Sower's Appeal, 89 Pa. St. 173.

88. Cossan v. Cossan, Wright, 147.

89. See Marker v. Marker, 3 Stock. 256. A case which tends to the opposite conclusion, and to deny that one deserts his wife who cruelly compels her to leave him, is Pidge v. Pidge, 3 Met. 257, Putnam, J., dissenting.

90. See Rittenhouse v. Rittenhouse, 29 N. J. Eq. 274; also, as to justification of divorce, *post*, § 1682.

91. Meldowney v. Meldowney, 27 N. J. Eq. 328. And see Childs v. Childs, 49 Md. 509; Cornish v. Cornish, 23 N. J. Eq. 208; Rittenhouse v. Rittenhouse, 29 N. J. Eq. 274.

92. Harding v. Harding, 22 Md.

A husband who orders his wife to leave him,[93] or by his cruelty forces her to do so, cannot obtain a divorce for desertion,[94] but is himself guilty of desertion,[95] which is not always shown where the husband is put out and wants to come back.[96]

§ 1645. Misconduct Justifying Desertion.

Desertion will be justified only by such conduct on the part of the other spouse as will entitle him to divorce,[97] and not by anything less,[98] but although the desertion was not justified, still,

337; Morris v. Morris, 20 Ala. 168; Kinsey v. Kinsey, 37 Ala. 393; Wood v. Wood, 5 Ire. 674; Levering v. Levering, 16 Md. 213; Houliston v. Smyth, 3 Bing. 127. And see *supra*, § 100.

93. Dabbs v. Dabbs, 196 Ala. 164, 71 So. 696; Hall v. Hall, 25 Ky. Law Rep. 1304, 77 S. W. 668; Kean v. Kean, 6 Ky. Law Rep., abstract 217.

94. Lea v. Lea, 99 Mass. 493, 96 Am. Dec. 772; Daugherty v. Daugherty, 28 Pa. Super. Ct. 327.

95. Sutermeister v. Sutermeister (Mo. App.), 209 S. W. 955.

96. Wheeler v. Wheeler, 101 Md. 427, 61 A. 216.

97. Israel v. Israel, 64 So. 67; Craig v. Craig, 89 Ark. 40, 117 S. W. 765; Warfield v. Warfield, 97 Ark. 125, 133 S. W. 606; Frank v. Frank, 178 Ill. App. 557; Walton v. Walton, 114 Ill. App. 116; Leonard v. Leonard, 174 Ia. 734, 156 N. W. 803; Mayes v. Mayes, 115 S.W. 717; Caskey v. Caskey, 4 Ky. Law Rep., abstract 726; Farwell v. Farwell, 47 Mont. 574, 133 P. 958; Rogers v. Rogers, 81 N. J. Eq. 479, 86 A. 935; Thomas v. Thomas, 74 A. 125; Suydam v. Suydam, 79 N. J. Eq. 144, 80 A. 1057; Crickler v. Crickler, 58 N. J. Eq. 427, 43 A. 1064; Lister v. Lister, 66 N. J. Eq. 434, 57 A. 1132; Deisler v. Deisler, 69 N. Y. S. 326, 59 App. Div. 207; Golden v. Golden, 36 Pa. Super. Ct. 648; Mendenhall v. Mendenhall, 12 Pa. Super. Ct. 290; Barrett v. Barrett, 20 S. D. 210, 105 N. W. 463; Crounse v. Crounse, 108 Va. 108, 60 S. E. 627; Denny v. Denny, 86 S. E. 835; Reynolds v. Reynolds, 68 W. Va. 15, 69 S. E. 381.

Under the statute providing that abandonment for a year shall be ground for divorce "to the party not in fault," plaintiff must show, not only the abendonment for one year, but that it was without fault on his part. Bishop v. Bishop, 155 Ky. 679, 160 S. W. 176.

98. Hitchcock v. Hitchcock, 15 App. D. C. 81 (parsimony and indifference); Hoeft v. Hoeft, 200 Ill. App. 49 (although wife had husband arrested and her adult sons threatened him if he came to the house); Loftus v. Loftus (Ill. App. 1907), 134 Ill. App. 360 (disturbing peace and quiet); Alderson v. Alderson's Guardian, 113 Ky. 830, 69 S. W. 706, 24 Ky. Law Rep. 595; Canine v. Canine, 13 Ky. Law Rep. 124, 16 S. W. 367 (fits of ill temper and quarrels);

where the attitude of the deserting party is such that the other is one with whom he cannot longer live, he is not entitled to a divorce.[99]

In some States, however, it is sufficient to justify desertion that the deserting party has cause to believe that the relation cannot be longer continued with health or safety or self-respect.[1]

The misconduct of the abandoned spouse after abandonment will not be a defence and justification to proceedings for separation.[2]

§ 1646. Leaving Through Fear of Detection.

A wife is guilty of desertion who leaves her husband because she is afraid he will discover her intimacy with another man.[3]

§ 1647. Decree of Foreign State as Evidence.

The decree of a foreign State in which the parties were living at

Schuman v. Schuman, 93 Mo. App. 99 (want of affection); Grove v. Grove, 79 Mo. App. 142 (quarrels brought about by her own misdeeds); Crane v. Crane (N. J. Ch. 1899), 45 A. 270 (not by venereal disease contracted before marriage); Renk v. Renk (N. J. Ch. 1897), 38 A. 427 (quarrels); Hague v. Hague, 84 N. J. Eq. 674, 95 A. 192 (interference and inattentiveness); Engelhardt v. Engelhardt, 73 N. J. Eq. 744, 70 A. 145; Lammertz v. Lammertz, 59 N. J. Eq. 649, 45 A. 271 (that husband petulant and slept in separate room); Loux v. Loux, 57 N. J. Eq. 561, 41 A. Lammertz v. Lammertz, 59 N. J. Eq. 193, 45 A. 261; Short v. Short, 62 Ore. 118, 123 P. 388 (rough jokes); Eshbach v. Eshbach, 23 Pa. (11 Harris) 343; Buys v. Buys, 56 Pa. Super. Ct. 338; Gray v. Gray (Tex. Civ. App. 1906), 95 S. W. 46.

Vulgar and unnatural conduct of a wife, and her solicitation of the husband to engage in such conduct will not justify him in breaking off cohabitation and treating her as having deserted him. Huff v. Huff, 73 W. Va. 330, 80 S. E. 846.

99. Smithkin v. Smithkin, 62 N. J. Eq. 161, 49 A. 815.

1. Lyster v. Lyster, 111 Mass. 327; Stocking v. Stocking, 76 Minn. 292; Tarrant v. Tarrant, 156 Mo. App. 725, 137 S. W. 56 (husband a habitual drunkard); Daeters v. Daeters (N. J. Ch. 1897), 38 Atl. 950 (where wife contracted venereal disease from husband); Musgrave v. Musgrave, 185 Pa. St. 260, 39 A. 961 (where wife sent to farm house to live); Dawkins v. Dawkins, 72 W. Va. 789, 79 S. E. 322.

2. Garcia v. Garcia, 111 N. Y. S. 1017, 60 Misc. 198.

3. Ogilvie v. Ogilvie, 37 Ore. 171, 61 P. 627.

the time that the wife was living apart from the husband for justifiable cause is competent evidence on the question of desertion.[4]

§ 1648. Judicial Summons to Return.

By statute is some States abandonment may be fixed by a judicial summons to the deserting spouse to return.[5]

4. Taylor v. Taylor, 72 N. H. 597, 57 A. 654.

5. Derby v. Dancey, 112 La. 891, 36 So. 795 (summons and notice to return may be fixed at longer intervals than required by statute); Rohr v. Stechman, 119 La. 159, 43 So. 991 (wife's refusal to obey order to return may be justified by order assigning her new domicile pending divorce); Rothstein v. Schimsky, 140 La. 815, 74 So. 111.

CHAPTER XXI.

INDIGNITIES.

SECTION 1649. In General.
1650. More Than One Act Necessary.
1651. Violence.
1652. Abuse and Quarrels.
1653. Cold or Unfriendly Conduct.
1654. Denial of Intercourse.
1655. Neglect.
1656. Treatment of or Relation With Others.
1657. Improprieties.
1658. Sodomy, Bestiality.
1659. Loathsome Disease.
1660. Forcing Wife to Submit to Abortion.
1661. Making Public Charges.
1662. Notifying Merchants to Deny Wife Credit.
1663. Non-Support.
1664. Sending Spouse to Insane Asylum.

§ 1649. In General.

As to "offering indignities," whether it be to a wife's person, "so as to render her condition intolerable and her life burdensome," or, in a reciprocal sense, so that either spouse may complain when aggrieved, the object of our numerous local statutes which specify this cause of divorce appears to be to punish conduct which produces, strictly speaking, no apprehension of bodily harm in the complainant, and yet is, so to speak, cruel and unkind. Publicity seems to be reckoned an important element in this class of cases, where apprehension of danger was not immediate, so that the offended spouse must have been wounded by being disgraced in the eyes of others. So "indignities to the person" and "cruel and barbarous treatment" are two distinct causes of divorce.[6]

The indignities need not be such as to endanger life or health,

6. Fay v. Fay, 27 Pa. Super. Ct. 328.

but it is sufficient if the treatment is such as to render the condition of the ordinary person intolerable.[7]

§ 1650. More Than One Act Necessary.

One act of indignity is not enough where the statute provides for divorce for indignities.[8]

§ 1651. Violence.

The phrase "indignities to the person" receives sometimes a literal interpretation,[9] and violent, contemptuous and insulting conduct will as a matter of course be classed as an indignity where unmerited.[10]

§ 1652. Abuse and Quarrels.

Indignities may be found in constant abuse,[11] and the abusive language need not have been used in the presence of another,[12] but it is not an indignity where the abusive language used was justified by the conduct of the other.[13] Merely faultfinding[14] or criticising

7. Simpkins v. Simpkins (Ark.), 207 S. W. 28; Scholl v. Scholl, 194 Mo. App. 559, 185 S. W. 762; Wares v. Wares, 122 Mo. App. 129, 98 S. W. 91 (suggesting that wife get money from other men); Holschbach v. Holschbach, 134 Mo. App. 247, 114 S. W. 1035 (must amount to mental cruelty); Krug v. Krug, 22 Pa. Super. Ct. 572; Lewis v. Lewis, 63 Pa. Super. Ct. 82; Crawford v. Crawford, 64 Pa. Super. Ct. 30; Sullivan v. Sullivan, 52 Wash. 160, 100 P. 321. See Meffert v. Meffert, 177 S. W. 1 (evils rendering cohabitation unsafe).

8. Mahn v. Mahn, 70 Mo. App. 337; Dowling v. Dowling, 183 Mo. App. 454, 167 S. W. 1077 (use of offensive language and immediate desertion constitute but one indignity); Krug v. Krug, 22 Pa. Super. Ct. 572.

9. Lewis v. Lewis, 5 Mo. 278.

10. Weller v. Weller, 154 Mo. App. 6, 133 S. W. 128; Ryan v. Ryan, 30 Ore. 226, 47 P. 101.

11. Clark v. Clark, 143 Mo. App. 350, 128 S. W. 218; Herriford v. Herriford, 169 Mo. App. 641, 155 S. W. 855 (abusing stepchildren); Kennedy v. Kennedy, 182 S. W. 100; Blair v. Blair, 131 Mo. App. 571, 110 S. W. 652; Augenstein v. Augenstein, 45 Pa. Super. Ct. 258; Briggs v. Briggs, 56 Wash. 580, 106 P. 126 (profane and vulgar language).

12. Schweikert v. Schweikert, 108 Mo. App. 477, 83 S. W. 1095.

13. Coe v. Coe, 98 Mo. App. 472, 72 S. W. 707.

14. Holschbach v. Holschbach, 134 Mo. App. 247, 114 S. W. 1035.

the children,[15] or refusal to comply with an unreasonable request, is not an indignity.[16]

§ 1653. Cold or Unfriendly Conduct.

Aversion[17] or acts showing suspicion and settled aversion may well be an indignity,[18] but mere coldness of disposition is not.[19]

§ 1654. Denial of Intercourse.

The refusal by a wife to perform her marital duties is not an indignity.[20]

§ 1655. Neglect.

Neglecting the wife for business,[21] or neglecting the husband to attend religious meetings, are not in themselves indignities.[22]

§ 1656. Treatment of or Relations with Others.

Familiarity with those unfriendly to the wife may be an indignity,[23] but refusal to send away defendant's son, with whom plaintiff could not get along,[24] or that the wife insists on her relatives living with her, are not indignities.[25]

§ 1657. Improprieties.

Such provisions include under the term indignities paying undue attention to a lover,[26] or imprudent conduct by the wife raising

15. Van Horn v. Van Horn, 82 Mo. App. 79.

16. Goodman v. Goodman, 80 Mo. App. 274.

17. Sabot v. Sabot, 97 Wash. 395, 166 P. 624.

18. Shine v. Shine (Mo. App.), 189 S. W. 403.

19. Wile v. Wile, 48 Pa. Super. Ct. 494.

20. Gruner v. Gruner, 183 Mo. App. 157, 165 S. W. 865; Johnson v. Johnson, 31 Pa. Super. Ct. 53; *contra*, Casey v. Casey, 180 Mo. App. 605, 163 S. W. 569.

21. Holschbach v. Holschbach, 134 Mo. App. 247, 114 S. W. 1035.

22. Johnson v. Johnson, 31 Pa. Super. Ct. 53.

23. Elder v. Elder (Mo. App.), 186 S. W. 530 (kissing wife of cousin).

24. Nickerson v. Nickerson, 34 Ore. 1, 54 P. 277.

25. Tegethoff v. Tegethoff (Mo. App.), 199 S. W. 460.

26. *Mere indiscreet conduct* and

suspicion as to her chastity.[27] But stealthy immoralities on the husband's part, such as getting a maid servant with child in the wife's chamber while she was absent, are not admissible allegations, it would appear, under this head.[28]

§ 1658. Sodomy, Bestiality.

Commission of unnatural acts against nature may be an indignity to the spouse.[29]

§ 1659. Loathsome Disease.

Communicating a loathsome disease may well be classed as an indignity.[30]

§ 1660. Forcing Wife to Submit to Abortion.

Forcing the wife to take medicine causing a miscarriage may be an indignity.[31]

§ 1661. Making Public Charges.

Charges of infidelity,[32] or abuse of process by false charges to the authorities, may be an indignity,[33] but not a false accusation of disease if made in good faith and not published.[34]

relations with young men on the part of a married woman, all embraced under the general term "flirting," is not cause for divorce. Hancock v. Hancock, 55 Fla. 680, 45 So. 1020, 15 L. R. A. (N. S.) 670; Penningroth v. Penningroth, 72 Mo. App. 329.

27. Herriford v. Herriford, 169 Mo. App. 641, 155 S. W. 855.

28. Miller v. Miller, 78 N. C. 102; Hooper v. Hooper, 19 Mo. 355. "Intolerable indignities" towards the husband are insufficient ground for a divorce in Pennsylvania. Miles v. Miles, 76 Pa. St. 357.

29. Friedmeyer v. Friedmeyer (Mo. App.), 194 S. W. 746.

30. McMahen v. McMahen, 186 Pa. 485, 41 L. R. A. 802.

31. Cunningham v. Cunningham (Mo. App.), 206 S. W. 240, 202 S. W. 420.

32. Green v. Green, 131 N. C. 533, 42 S. E. 954, 92 Am. St. R. 788; Ponthus v. Ponthus, 66 Pa. Super. Ct. 257; Cheatham v. Cheatham, 10 Mo. 296; Coble v. Coble, 2 Jones Eq. 392. And such is sometimes the statute specification, as in West Virginia.

33. McGee v. McGee, 161 Mo. App. 40, 143 S. W. 77.

34. Goodman v. Goodman, 80 Mo. App. 274.

§ 1662. Notifying Merchants to Deny Wife Credit.

Without reason notifying the merchants in town not to give the wife credit may well be an indignity.[35]

§ 1663. Non-Support.

Refusal to support a wife who has deserted him,[36] or mere refusal to support a wife who has ample means of her own, is not an indignity.[37]

§ 1664. Sending Spouse to Insane Asylum.

Sending husband to a hospital for the insane under the honest but mistaken belief that this was for his good is not an indignity.[38]

35. Young v. Young (Tenn. Ch. App. 1900), 57 S. W. 438.

36. Roth v. Roth, 15 Pa. Super. Ct. 192.

37. Weller v. Weller, 154 Mo. App. 6, 133 S. W. 128.

38. Wilson v. Wilson (Mo. App.), 190 S. W. 53.

CHAPTER XXII.

OTHER CAUSES OF DIVORCE.

SECTION 1665. Cohabitation Rendered Unsafe or Intolerable.
1666. Violent Temper.
1667. Incompatibility.
1668. Public Defamation.
1669. Neglect of Duty.
1670. Non-Support.
1671. Living Apart.
1672. Absence Unheard of.
1673. Joining Shakers.
1674. Sodomy; Bestiality.
1675. Any Cause Deemed Sufficient.

§ 1665. Cohabitation Rendered Unsafe or Intolerable.

In some States a cause for divorce is any conduct rendering cohabitation unsafe or sometimes the language is conduct rendering cohabitation intolerable.

Conduct rendering cohabitation unsafe may appear where the wife poisons the husband's food.[39]

The fact that the husband's frequent intoxication was so connected with acts of cruelty as to render cohabitation unsafe may be shown as a cause of divorce.[40]

Cohabitation is not rendered unsafe by impulsive acts at long intervals,[41] or where the wife forges the husband's signature,[42] or where the husband has consumption,[43] and the husband's adultery does not render it unsafe for the wife to cohabit.[44]

39. Motley v. Motley, 93 Mo. App. 473, 67 S. W. 741.

40. O'Neill v. O'Neill, 163 N. Y. S. 250.

41. Rebstock v. Rebstock, 144 N. Y. S. 289; De Vide v. De Vide, 174 N. Y. S. 774 (throwing shoes at wife).

42. Weaver v. Weaver, 178 N. Y. 621, 70 N. E. 1111.

43. Abramowitz v. Abramowitz, 140 N. Y. S. 275.

44. Allen v. Allen, 110 N. Y. S. 303, 125 App. Div. 838.

The communication to the wife by the husband of a loathsome disease is such conduct as renders her condition intolerable.[45]

"Gross misbehavior and wickedness repugnant to and inconsistent with the marriage contract" authorizes a divorce under a Rhode Island statute. But it appears that loving and keeping company with another woman is not an offence within this statute, if the intimacy does not extend to adulterous intercourse.[46]

§ 1666. Violent Temper.

In Florida habitual indulgence in ungovernable temper is a cause for divorce when rendering the performance of marital duties impracticable,[47] but mere ungovernable temper is not ordinarily a ground for divorce.[48]

§ 1667. Incompatibility.

Incompatability of temper and evidence that a couple can no longer live together harmoniously is no ground for a divorce,[49] except in some States, where the cause of inability to live together is not the fault of the plaintiff.[50]

45. Simon v. Simon, 34 Pa. Super. Ct. 182.

46. Stevens v. Stevens, 8 R. I. 557. "Grossly immoral conduct, rendering impossible the bringing up of the isue of the marriage properly," is held insufficient cause of divorce in Pennsylvania. Miles v. Miles, 76 Pa. St. 357.

47. Beekman v. Beekman, 53 Fla. 858, 43 So. 923 (petulance not enough; Hickson v. Hickson, 54 Fla. 556, 45 So. 474.

48. Caudill v. Caudill, 172 Ky. 460, 189 S. W. 431; Kelly v. Kelly (Ky.), 209 S. W. 335 (occasional fits of bad temper). Cf. further *ante*.

49. Gustafson v. Gustafson, 66 Ill. App. 40; Smith v. Smith (Ia.), 161 N. W. 698; Olson v. Olson, 130 Ia. 353, 106 N. W. 758; Ogden v. Hebert, 49 La. Ann. 1714, 22 So. 919; Morrison v. Morrison, 64 Mich. 53, 30 N. W. 903; Appleby v. Appleby (N. Y.), 2 McCarty Civ. Proc. 422 Donohue v. Donohue, 167 N. Y. S. 715, 180 App. Div. 561; Morris v. Morris, 177 N. Y. S. 600; Hengen v. Hengen, 85 Ore. 155, 166 P. 525; Waterman v. Waterman, 80 Ore. 511, 157 P. 791; Spady v. Spady, 79 Ore. 421, 155 P. 169; Wheeler v. Wheeler, 38 Wash. 491, 80 P. 762; Hilleware v. Hilleware, 92 Wash. 99, 158 P. 999.

50. Bickford v. Bickford, 57 Wash. 639, 107 P. 837; Spute v. Spute, 74 Wash. 665, 134 P. 175; Pierce v. Pierce, 68 Wash. 415, 123 P. 598;

§ 1668. Public Defamation.

In some States public defamation of the character of the spouse is a distinct ground for separation,[51] but a confidential statement to relatives and friends is not a public defamation under such a statute.[52]

§ 1669. Neglect of Duty.

"Gross neglect of duty" is a specific cause of divorce under some of our local codes. This, we are to understand, may not comprehend the husband's abandonment and refusal to furnish adequate support to his wife,[53] but the failure of a husband to support his wife when able to do so is neglect of duty,[54] although such duty is not performed so as to bar divorce where the husband merely pays his wife an allowance under order of court.[55]

Passive neglect of duty, if made a ground of divorce, might be thought better related to desertion than cruelty, which is usually active and aggressive in operation.[56]

Neglect of duty may consist in putting away the husband in an insane asylum without cause,[57] and refusal of sexual intercourse may be "gross neglect of duty."[58]

Turner v. Turner, 82 Wash. 518, 144 P. 689; Freeburn v. Freeburn (Wash.), 182 P. 620.

The fact that a husband and wife have hopelessly drifted apart is no ground for divorce at his instance, where the separation was due wholly to his own wrongdoing. Maloney v. Maloney, 83 Wash. 656, 145 P. 631.

51. Linzay v. Linzay, 51 La. Ann. 630, 25 So. 308; Harrison v. Harrison, 115 La. 817, 40 So. 232; Loring v. Loring, 17 Tex. Civ. App. 95, 42 S. W. 642.

52. Primeaux v. Comeaux, 139 La. 549, 71 So. 845.

53. Smith v. Smith, 22 Kan. 699.

54. Lee v. Lee, 38 Okla. 388, 132 P. 1070. See Beauchamp v. Beauchamp, 44 Okla. 634, 146 P. 30 (not where wife did not need help and left husband).

55. Tirrell v. Tirrell, 72 Conn. 567, 45 A. 153, 47 L. R. A. 750 (in insane asylum).

56. "Vagrancy" of the husband is a specified cause in the Missouri code. Browne's Digest, Part I.

57. Osterhout v. Osterhout, 30 Kan. 746, 2 P. 869.

58. Leach v. Leach, 46 Kan. 724, 27 P. 131; *contra*, McKinney v. McKinney, 9 Ohio S. & C. P. Dec. 655.

§ 1670. Non-Support.

Mere failure to support is not a ground for divorce in the absence of direct provision to that effect,[59] especially where the husband had supported his family until a short time before the action,[60] or where the wife had left him without good cause,[61] or where he tries in good faith to support his family and fails.[62]

But statutes sometimes enumerate specially, among causes of divorce, the gross and wanton and cruel refusal or neglect of the husband, being of sufficient ability, to provide suitable maintenance for his wife.[63] The length of time which must elapse in such cases to perfect the complainant's remedy is less, usually, than in ordinary desertion; nor is desertion a requisite, but, on the other hand, the judicial inclination appears to be against permitting mere neglect on the husband's part, without aggravating circumstances, to be thus set up against him;[64] or a failure to provide, where the wife was not thereby left destitute,[65] or where the husband has not suitable means or capacity for providing support.[66]

In such States a wife can obtain a divorce for non-support where the husband, having sufficient ability, without just cause fails to provide support,[67] or the wife may obtain a decree for separation

59. Arnold v. Arnold, 170 S. W. 486; Van Horn v. Arantes, 116 La. 130, 40 So. 592; Weller v. Weller, 154 Mo. App. 6, 133 S. W. 128. See Saillard v. Saillard, 2 Tenn. Ch. App. 396; Barrett v. Barrett (Tex. Civ. App. 1910), 131 S. W. 821.

60. Branch v. Branch, 30 Colo. 499, 71 P. 632.

61. Fuller v. Fuller, 108 Ga. 256, 33 S. E. 865; Barnett v. Barnett, 27 Ind. App. 466, 61 N. E. 737.

62. Freeman v. Freeman, 94 Mo. App. 504, 68 S. W. 389; Gallemore v. Gallemore, 115 Mo. App. 179, 91 S. W. 406; Loring v. Loring, 17 Tex. Civ. App. 95, 42 S. W. 642.

63. Holt v. Holt, 117 Mass. 202; Peabody v. Peabody, 104 Mass. 195.

64. *Ib.*

65. Washburn v. Washburn, 9 Cal. 475; Holt v. Holt, 117 Mass. 202.

66. Cram v. Cram, 6 N. H. 87; Davis v. Davis, 37 N. H. 191. In these and various other respects, statutes differ in their statement of the offence.

67. Locke v. Locke, 153 Cal. 56, 94 P. 244; Shelhart v. Shelhart (Mich.), 161 N. W. 843; Gellatly v. Gellatly, 151 N. W. 1037; Svanda v. Svanda, 93 Neb. 404, 140 N. W. 777, 47 L. R. A. (N. S.) 606; Taylor v. Taylor, 20 N. M. 13, 145 P. 1075;

for non-support.[68] A divorce for non-support will not be ordered where the husband makes fair provision for his family,[69] or where the wife did not request or need support from the husband,[70] or where the wife leaves the husband.[71] Wanton and cruel neglect and failure to furnish the wife with support as a ground for divorce is not shown by the husband's failure to support for five years while she was living with her parents, who died and left her some money, and while she was running a boarding-house, where the failure was caused by his misfortune in losing his position and failure to find another for some time on account of the panic of 1907. Neither misfortune nor incompetence resulting in a failure to support affords the wife any ground for relief under the law. The possibility of such a result was one of the hazards she assumed when she married him.[72]

§ 1671. Living Apart.

In some States the statute makes living apart for a certain period without cohabitation a cause for divorce,[73] and such living

Brown v. Brown, 109 N. Y. S. 637; Uhler v. Uhler, 128 N. Y. S. 963; Seigmund v. Seigmund, 46 Wash. 572, 90 P. 913; Garland v. Garland, 66 Wash. 226, 119 P. 386.

68. Drummond v. Drummond, 171 N. Y. S. 477.

69. Fowler v. Fowler, 138 Ky. 326, 127 S. W. 1014 (fact that wife uses her own money to help pay for supplies does not show husband's failure to support). Carson v. Carson, 172 Mich. 452, 138 N. W. 1076; Bowen v. Bowen, 179 Mich. 574, 146 N. W. 271; Farwell v. Farwell, 47 Mont. 574, 133 P. 958; Wendling v. Wendling, 134 N. Y. S. 55.

That a husband does not give his wife money is not of itself a failure to support. Donley v. Donley, 150 Mo. App. 660, 131 S. W. 356.

That a man occasionally gambled and speculated in stocks and thereby lost money is not a sufficient ground for divorce, where as a general rule he made liberal provision for the support of his family. Cadieux v. Cadieux, 180 Mich. 99, 146 N. W. 161.

70. Baker v. Baker, 168 Cal. 346, 143 P. 607; Hansen v. Hansen, 27 Cal. App. 401, 150 P. 70; *contra*, Merriam v. Merriam, 75 Wash. 389, 134 P. 1058.

71. Johnston v. Johnston, 17 Cal. App. 241, 119 P. 403.

72. Carson v. Carson (Mich.), 138 N. W. 1076, 43 L. R. A. (N. S.) 255.

73. Severns v. Severns, 107 Ill. App. 141 (refusal of wife to cohabit not ground for divorce); Parker v. Parker, 31 Ky. Law Rep. 1228, 104 S. W. 1028 (no matter which party

apart constitutes ground for divorce although under a decree for separation,[74] but even under such a statute the divorce will not be granted where the separation was due to the fault of the person asking for it.[75]

Under such a statute, however, it has been held that the fact that a decree for divorce from bed and board had already been granted does not affect the rights of the parties to divorce for separation, and the time during which they were living apart under the former decree may be counted in computing the statutory period of separation. The fact that the separation was caused by the fault of the present plaintiff is not a bar to his action, as the legislature has evidently considered that the divorce should take place in such case regardless of the cause of the trouble.[76] Divorce may be granted where the separation was in part but not entirely due to the insanity of one of the parties.[77]

§ 1672. Absence Unheard of.

The absence of one of the spouses for a fixed number of years without "being heard of," when permitted to serve as a ground of divorce, upon due lapse of time and strictness of proof, may be said to furnish to the forsaken partner an opportunity of marrying once more, while relieved of those painful risks as to the validity

was in default); Gruner v. Gruner, 183 Mo. App. 157, 165 S. W. 865; Brown v. Brown (N. H.), 100 A. 604.

74. Brown v. Brown, 172 Ky. 754, 189 S. W. 921.

75. Tipton v. Tipton (Ia.), 151 N. W. 90; Boreing v. Boreing, 114 Ky. 522, 71 S. W. 431, 24 Ky. Law Rep. 1288; Cook v. Cook, 164 N. C. 272, 80 S. E. 178; Jaknbke v. Jaknbke, 125 Wis. 635, 104 N. W. 704.

To constitute a "voluntary separation" of husband and wife for a period of five years next preceding the commencement of the action a ground of divorce, it must appear that the separation was mutually voluntary in its inception, and so continued throughout the statutory period. Sanders v. Sanders, 135 Wis. 613, 116 N. W. 176. See Landphair v. Landphair, 112 Ark. 608, 165 S. W. 960. See, however, Clark v. Clark, 21 Ky. Law Rep. 955, 53 S. W. 644.

76. Cooke v. Cooke, 164 N. C. 272, 80 S. E. 178, 49 L. R. A. (N. S.) 1034.

77. Andrews v. Andrews' Committee, 120 Ky. 718, 87 S. W. 1080, 27 Ky. Law Rep. 1119.

of the new union which we have considered in connection with bigamous marriages.

§ 1673. Joining Shakers.

But other statute causes of divorce may here be stated which are closely allied to desertion. One of these is the offence of joining the Shakers, or, to speak more exactly, of uniting and continuing with some society which holds the relation of husband and wife unlawful.[78] Under statutes which run thus, it is held that if both husband and wife join the society, and afterwards one of them withdraws, such party may treat a refusal of the other to resume the marital relation as constituting the offence in question. A specific period of continuance in such society is usually set by such statutes, the lapse of which perfects the right to a divorce.[79]

§ 1674. Sodomy; Bestiality.

Sodomy and other unnatural and bestial practices are referable to this same head of sexual infidelity; and it is observable that, while such offences are scarcely ever mentioned in American divorce acts,[80] the English Divorce Statute, 20 & 21 Vict., c. 85, specifies them, together with incestuous adultery, bigamous adultery, adultery coupled with cruelty, and rape, as causes of marriage dissolution, on the wife's petition; all such carnal deeds quite transcending, in its purview, the offence of simple adultery, so far as a husband may have committed it.

Vulgar, indecent and unnatural conduct of the wife and her solicitation of the husband to engage in such conduct with her is not cause for divorce as acts of mere degradation and degeneracy in one of the parties are not grounds of divorce unless made so by statute.[81]

78. Dyer v. Dyer, 5 N. H. 271.

79. Fitts v. Fitts, 46 N. H. 184.

80. But in Alabama, and perhaps one or two other States, this cause is specified. Browne's Digest of Divorce, 1, 55.

81. Huff v. Huff (W. Va.), 80 S. E. 846, 51 L. R. A. (N. S.) 282.

§ 1675. Any Cause Deemed Sufficient.

Statutes in some States provide that a divorce may be granted for any cause deemed by the court sufficient,[82] and in a few American States the legislature has invited great abuse of divorce facilities within its local jurisdiction, by further providing that, at the discretion of the court, divorce may be granted "for any other cause."[83] In Maine, too, the Revised Statutes allow a divorce from the bonds of matrimony to be decreed by any judge of the Supreme Court "when, in the exercise of a sound discretion, he deems it reasonable and proper, conducive to domestic harmony, and consistent with the peace and morality of society."[84] An unlimited discretion of this character, though confided more safely to the judiciary, perhaps, than any other department of government — since in the United States the courts are almost invariably found more conservative than either branch of the legislature — is, indeed, exceedingly dangerous, the more so that it leaves rights and remedies pertaining to the domestic life precarious, which ought, of all things, to be secure and sacred. And Mr. Bishop has expressed his preference for statutes which leave rather this discretion to be exercised within well-defined limits, such, for in-

82. Phillips v. Phillips, 173 Ky. 608, 191 S. W. 482 (evidence that man married only to obtain woman's money); Burns v. Burns, 173 Ky. 105, 190 S. W. 683 (only some grave cause); Irwin v. Irwin, 96 Ky. 318, 28 S. W. 664, 30 S. W. 417, 16 Ky. Law Rep. 657 (extreme neglect); Kefauver v. Kefauver, 22 Ky. Law Rep. 386, 57 S. W. 467 (unfounded charge of unchastity by wife); Riley v. Riley, 13 Ky. Law Rep. (abstract) 95; Callender v. Callender, 15 Ky. Law Rep. (abstract) 63; Walker v. Walker, 95 A. 925 (where husband unduly intimate with another woman though not committing adultery); Colvin v. Colvin, 15 Wash. 490, 46 P. 1029 (divorce not granted where failure to live together is due to obstinacy of both parties); Stanley v. Stanley, 24 Wash. 460, 64 P. 732 (quarrels not enough); Poler v. Poler, 32 Wash. 400, 73 P. 372 (sodomy enough).

83. The statutes of Illinois and Indiana contain such provisions, or did so lately. Browne's Digest of Divorce, Part I.

84. Brown's Digest of Divorce, Part I. In Maine, a combination of such wrongs as might each become by a sufficient length of continuance, a ground of divorce under the former law, might all together, under the statute as revised, each continuing a less time, become so. 31 Me. 490.

stance, as permitting divorce to be pronounced in a case which comes within the reason of the causes specified by the legislative intention, though perhaps without its literal expression as illumined by judicial precedents.

In one Indiana case, under such a provision, it was said that, in order to enable the court to exercise its discretion, there ought to be an injured party, for to such persons alone relief by divorce could be afforded.[85] Again, it is said, some cause for divorce is requisite.[86] And, generally, we may assume that the discretion to be exercised in such cases is a judicial one, limited by the rules appropriate to tribunals of justice, and not an arbitrary and fluctuating discretion, such as a legislature not unfrequently exercises.[87] And yet the statute range permitted by acts of this character is so broad that much must be left after all to the conscience of the presiding judge.

In Iowa, whose old code provides that a divorce may be decreed where the parties cannot live in peace and happiness together, it is ruled that the chancellor must be fully satisfied of the facts, and that the moral, social, and mental welfare of the parties and their children requires a permanent separation. Cases might thus arise, however, where the parties were mutually at fault, and yet a divorce would be decreed.[88]

Under a statute permitting the court to grant a divorce for such cause as it may deem sufficient, one should be granted for any conduct on the part of the husband or wife which is calculated to seriously impair the health or permanently destroy the happiness of the other. The object of the court is not to punish the offender, but to protect the unfortunate; and while a decree should never be granted for slight differences, which are likely to arise in the best of well-regulated families, it should not be denied when it is made clearly to appear that the conduct of the offending party is such

85. Curry v. Curry, 1 Wilson (Ind.), 236.

86. Ritter v. Ritter, 5 Blackf. 81.

87. See, on this point, Ritter v. Ritter, 5 Blackf. 81; Scroggins v. Scroggins, 3 Dev. 535.

88. Inskeep v. Inskeep, 5 Ia. 204.

that to continue the marital relation would either permanently destroy the happiness or ruin the health of the other. Of this nature are continual faultfinding, and unkind words and acts which injure the wife's health.[89]

89. McClintock v. McClintock, 147 Ky. 409, 144 S. W. 68, 39 L. R. A. (N. S.) 1127.

CHAPTER XXIII.[90]

DEFENCES IN GENERAL.

SECTION 1676. Invalidity of Marriage.
1677. Abatement on Death.
1678. Estoppel as Defence.
1679. Insanity.
1680. Laches.
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§ 1676. Invalidity of Marriage.

A divorce will be denied where there is no proper proof of marriage, and proof of a common-law marriage may be enough where such marriage is legal,[91] but the fact that the marriage is voidable is no defence to an action for divorce unless it has been declared void;[92] and the fact that the marriage had been declared void in another State is a defence to an action of divorce.[93]

The statute may give the innocent party to the second marriage a right to divorce where a second marriage is entered into with one ignorant of the first marriage.[94]

Where cousins are married prior to the passage of an act mak-

90. Failure to pay alimony or support as defence to right of action for divorce, see *post*, § 1857.

91. Coad v. Coad, 87 Neb. 290, 127 N. W. 455.

92. Taylor v. Taylor, 173 N. Y. 266, 65 N. E. 1098, affg. 71 N. Y. S. 411, 63 App. Div. 231.

93. McCormack v. McCormack (Cal.), 165 P. 930; Holtman v. Holtman (Ky. 1909), 114 S. W. 1198; Lindsey's Devisee v. Smith, 131 Ky. 176, 114 S. W. 779 (slaves).

94. Moore v. Moore, 102 Tenn. 148, 52 S. W. 788.

ing such marriages illegal, the court cannot consider their relationship as bearing on the issues.[95]

The invalidity of the marriage is no defence to an action for separation.[96]

§ 1677. Abatement on Death.

No decree in divorce can be entered after death of one of the parties,[97] except by statute,[98] and a decree *nisi* cannot be made absolute after death of either party.[99]

The action for divorce is personal and the death of one of the parties eliminates the controversy, hence a decree of divorce cannot be set aside after the death of one of the parties,[1] but the decree may after death be reopened to determine property rights,[2] and the action may survive as to judgment for alimony and the rights of third persons.[3]

§ 1678. Estoppel as Defence.

A divorce will not usually be denied on the ground of estoppel, as the married state is a matter of public interest.[4]

Where the defendant, knowing the facts, assured plaintiff that her former marriage was invalid to induce her to marry him, he is

95. Aikens v. Aikens, 57 Pa. Super. Ct. 424.

96. Ostro v. Ostro, 155 N. Y. S. 681, 169 App. Div. 790.

97. Strickland v. Strickland, 80 Ark. 451, 97 S. W. 659; Hite v. Mercantile Trust Co., 156 Cal. 765, 106 P. 102; Heck v. Bailey (Mich.), 169 N. W. 940. Decree *In re* Crandall (1908), 111 N. Y. S. 1115, 127 App. Div. 945, reversed. *In re* Crandall's Estate, 196 N. Y. 127, 89 N. E. 578; Hunt v. Hunt, 135 N. Y. S. 39, 75 Misc. 209; Faversham v. Faversham, 146 N. Y. S. 569, 161 App. Div. 521; Baker v. Stephenson (Tex. Civ. App.), 174 S. W. 970.

98. John v. Superior Court in and for Los Angeles County, 5 Cal. App. 262, 90 P. 53.

99. Wood v. Wood, 74 A. 560; Dunham v. Dunham, 82 N. J. Eq. 395, 89 A. 281.

1. Dwyer v. Nolan, 40 Wash. 459, 82 P. 746, 1 L. R. A. (N. S.) 551.

2. Lima v. Lima, 26 Cal. App. 1, 147 P. 233, rehearing denied (Sup.) Id. 237; Hill v. Victora (Ia.), 161 N. W. 72.

3. Masterson v. Ogden, 78 Wash. 644, 139 P. 654.

4. Barringer v. Dauernheim, 127 La. 679, 53 So. 923.

barred from setting up this former marriage in defence of an action for divorce,[5] and this defence cannot be set up where both parties mistakenly believed the marriage was legal.[6]

§ 1679. Insanity.[7]

While a divorce will not be granted for acts committed during insanity, a divorce may be obtained for acts happening prior thereto notwithstanding the subsequent insanity.[8] So desertion may be committed and a divorce obtained therefor although the defendant become insane before the action was brought, where he was of sound mind when the desertion for the statutory period occurred.[9] And a divorce for cruelty will be granted where the cruelty is the result of the defendant's insanely jealous temperament, where no actual insanity appeared,[10] but where the defendant's mental condition rendered him unaccountable this may be a defence.[11]

Even sexual intercourse by the wife with other men while insane does not constitute adultery, the necessary intent being absent.[12]

Where the court finds both parties insane, the case should be disposed of as public policy and the interests of the parties require.[13]

5. Johannessen v. Johannessen, 128 N. Y. S. 892, 70 Misc. 361.

6. Robinson v. Robinson, 93 A. 699, affirming decree (Ch.) 83 N. J. Eq. 150, 90 A. 311.

7. Insane person as party to divorce action, see *ante*, § 1515.

Insanity as defence to adultery, see *ante*, § 1562.

Insanity as defence to action for desertion, see further, *ante*, § 1621.

8. Huston v. Huston's Committee, 150 Ky. 353, 150 S. W. 386; Thomason v. Thomason, 142 Ky. 176, 134 S. W. 161; Lewis v. Lewis (Okla.), 158 P. 368; Steed v. Steed (Utah), 181 P. 445; Mordaunt v. Moncreiffe, L. R. 2 H. L. Sc. 374.

9. Harrisan v. Harrigan, 135 Cal. 397, 67 P. 506, 87 Am. St. R. 118; Fisher v. Fisher, 54 W. Va. 146, 46 S. E. 118. See further *ante*.

10. Walton v. Walton, 57 Neb. 102, 77 N. W. 392.

11. Longbotham v. Longbotham, 119 Minn. 139, 137 N. W. 387; Bethel v. Bethel, 181 Mo. App. 601, 164 S. W. 682; Kretz v. Kretz, 73 N. J. Eq. 246, 67 A. 378.

12. Laudo v. Laudo, 177 N. Y. S. 396.

13. Garnett v. Garnett, 114 Mass. 139. Here the insanity occurred after a divorce *nisi* had been granted, and the question arose afterwards as to making the decree absolute.

§ 1680. Laches.

An action for divorce may be barred by laches,[14] but the public or the court is not barred from action by laches as it is a general rule that "nothing is concluded against the judge."[15]

Delay in bringing an action for divorce on account of impotence may not be a bar, but is a fact to be considered.[16]

§ 1681. Special Limitations.

Lapse of time appears quite frequently as a material circumstance in connection with the proof elicited for establishing one or another of the main defences we have already considered, in which sense it deserves hardly more than the incidental treatment bestowed upon it in such cases. But lapse of time is found to operate more widely as a bar to divorce proceedings, and such plea may be set up on the usual theory of limitations. "Courts of equity, for the peace of society," it is observed in an American case, "discourage antiquated and stale demands, and, acting on this inherent doctrine, refuse to interfere where there has been a long acquiescence."[17] Want of knowledge would, of course, excuse a delay, but the matrimonial offence once discovered or opened to the wronged spouse's knowledge, divorce proceedings should be promptly instituted and pursued; or else, irrespective of positive inference that the wrong has been willingly condoned or connived at, the plaintiff's remedy is lost; and, in fact, local statutes are found which fix precise limits of time,[18] or, as in England, permit the court at discretion to refuse divorce upon

14. Bass v. Bass, 165 Ala. 223, 51 So. 753 (23 years in case of impotency); Smith v. Smith, 116 La. 1005, 41 So. 238 (parties having lived together nearly fifty years); Barker v. Barker, 63 N. J. Eq. 593, 53 A. 4 (25 years delay after discovery of adultery). See Carlin v. Carlin, 65 Ill. App. 160.

15. Milster v. Milster (Mo. App.), 209 S. W. 620.

16. Grosvenor v. Grosvenor, 194 Ill. App. 652 (eight years).

17. Rawdon v. Rawdon, 28 Ala. 565.

18. Five years is a limitation favored in some States. Valleau v. Valleau, 6 Paige, 207. In others the period as to adultery for instance, is as brief as one year. Smedley v. Smedley, 30 Ala. 714.

"unreasonable delay" in presenting or prosecuting the petition.[19]

There are special limitations on divorce in various States, as that action must be brought without unnecessary delay,[20] or within a certain time after the act complained of,[21] or within a certain time after desertion,[22] or cruelty,[23] or condemnation of felony,[24] or indignities,[25] or living apart for five years,[26] or within a certain time after discovery of the act complained of,[27] or within a certain time after judgment for separation.[28]

Such a statute does not, however, prevent the defendant from setting up in defence acts which occurred more than the statutory period before the beginning of suit.[29]

§ 1682. Provocation.

A divorce will not be granted where the plaintiff has provoked the conduct complained of, as where the husband's cruelty is pro-

19. Pellew v. Pellew, 1 Swab. & T. 553; Smallwood v. Smallwood, 2 Swab. & T. 397. Irrespective of statute, courts appear to exercise great latitude of discretion in such matters. *Ib.* And the tardy wife is favored above the tardy husband. Cummins v. Cummins, 2 McCarter, 138; Cooke v. Cooke, 3 Swab. & T. 126.

20. Thomson v. Thomson, 121 Cal. 11, 53 P. 403.

21. Huston v. Huston's Committee, 150 Ky. 353, 150 S. W. 386.

22. Poe v. Poe, 125 Ark. 391, 188 S. W. 1190. (Under a statute providing that suit must be brought within five years after the act complained of suit based on desertion need not be brought within five years of the desertion); Howard v. Howard, 134 Cal. 346, 66 P. 367 (desertion dates from first endeavor to effect reconciliation).

23. See Shoup v. Shoup, 106 Ill. App. 167 (six years).

24. Davis v. Davis, 102 Ky. 440, 43 S. W. 168, 19 Ky. Law Rep. 1520, 39 L. R. A. 403 ("condemnation of felony" does not refer merely to conviction but exists as long as judgment is in force).

25. Green v. Green, 131 N. C. 533, 42 S. E. 954, 92 Am. St. R. 788 (evidence of an indignity within six months of action excluded).

26. Clark v. Clark, 21 Ky. Law Rep. 955, 53 S. W. 644 (although have lived apart for more than five years).

27. (1910) Ackerman v. Ackerman, 200 N. Y. 72, 93 N. E. 192, affirming judgment (1908) 108 N. Y. S. 524, 123 App. Div. 750.

28. Wheeler v. Britton, 137 La. 975, 69 So. 766.

29. Johnson v. Johnson (Ky.), 209 S. W. 385.

voked by the wife's fault,[30] or where the wife's cruelty[31] or desertion is brought about by the conduct of the husband,[32] or where the wife's adultery is brought about in part by his neglect,[33] or where the wife's cruel conduct is induced by the husband's conduct,[34] or where desertion by the husband is induced by the fault of the wife.[35]

30. Jones v. Jones, 66 So. 4; Boeck v. Boeck, 29 Idaho, 639, 161 P. 576; Fightmaster v. Fightmaster, 22 Ky. Law Rep. 1512, 60 S. W. 918; Ashburn v. Ashburn, 101 Mo. App. 365, 74 S. W. 394 (husband's accusations of infidelity caused by wife's indiscreet conduct); Page v. Page, 161 N. C. 370, 76 S. E. 619; Mosher v. Mosher, 16 N. D. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820; Pittis v. Pittis, 82 N. J. Eq. 635, 89 A. 749 (wife's false accusation); Duvale v. Duvale, 65 N. J. Eq. 771, 60 A. 1134; Gray v. Gray, 148 N. Y. S. 1064, 85 Misc. 584; Robinson v. Robinson, 125 N. Y. S. 1064, 69 Misc. 438; Powers v. Powers, 82 N. Y. S. 1022, 84 App. Div. 588 (error to limit evidence to acts occurring not later than same day); Mendelson v. Mendelson, 37 Ore. 163, 61 P. 645; Biddle v. Biddle, 50 Pa. Super. Ct. 30; Hopkins v. Hopkins, 34 S. D. 637, 150 N. W. 293; Bohan v. Bohan (Tex. Civ. App. 1900), 56 S. W. 959 (misconduct of plaintiff must be of same general character as defendant's); *contra*, Dimmitt v. Dimmitt, 167 Mo. App. 94, 150 S. W. 1107 (deceit by wife not enough). See Weirsmith v. Weirsmith (Ia.), 161 N. W. 439 (proper friendship of wife for aged man is not a cause for his cruel treatment of her); Emery v. Emery, 181 Mich. 146, 147 N. W. 452; Barryman v. Berryman, 59 Mich. 605, 26 N. W. 789; McLanahan v. McLanahan, 104 Tenn. 217, 56 S. W. 858.

A wife who abandoned her husband without just cause is not entitled to a divorce either absolute or from bed and board. Coles v. Coles, 130 Ky. 349, 113 S. W. 417.

Drunkenness. A wife's provocation can never justify or excuse the husband for becoming an habitual drunkard. Barringer v. Barringer, 153 N. C. 392, 69 S. E. 279.

31. Spofford v. Spofford, 18 Idaho, 115, 108 P. 1054; Rutledge v. Rutledge, 159 Mo. App. 661, 139 S. W. 1180; Voss v. Voss, 157 Wis. 430, 147 N. W. 634.

32. Baurens v. Giroux, 117 La. 696, 42 So. 224; Cox v. Cox, 35 Mich. 461.

33. *The mere fact* that spouses are living apart will not justify adultery. Donohue v. Donohue, 159 Mo. App. 610, 141 S. W. 465; Heidrich v. Heidrich, 22 Pa. Super. Ct. 72 (where husband turns wife into street with little money); Moore v. Moore, 102 Tenn. 148, 52 S. W. 778.

34. Doyle v. Doyle, 26 Mo. 545; McAllister v. McAllister, 7 N. D. 324, 75 N. W. 256.

35. See McAndrews v. McAndrews, 31 Pa. Super. Ct. 252; Hunter v. Hunter, 121 Ill. App. 380 (wife's laziness and untidiness is not excuse for desertion).

Drunkenness in the husband cannot excuse cruel treatment by the wife,[36] but the mere fact that the wife falls below the average in the discharge of her marital duties will not excuse the husband in treating her with cruelty.[37]

§ 1683. Previous Crime by Libellant Is No Defence.

The fact that plaintiff in an action for divorce had sworn falsely some years before in another suit is not sufficient to estop him from pressing his action.[38]

§ 1684. Prior Void Divorce No Defence.

The fact that the libellant had previously obtained a divorce in another State, void by the laws of the State where the present action is brought, does not amount to an estoppel.[39]

§ 1685. Pendency of Another Action.

Where the causes of action are different, one divorce suit is not a bar to another between the same parties,[40] and an action for divorce based on false statements is no defence to a suit for divorce brought by the other party.[41] So the pendency of an action for divorce in one State does not bar an action for divorce brought by the other party in another State,[42] and that an order for alimony is enforced in another county is not a defence to divorce.[43]

36. Harl v. Harl, 24 Ky. Law Rep. 2163, 73 S. W. 756.

37. Closz v. Closz (Ia.), 169 N. W. 183.

38. Conner v. Pozo, 114 La. 562, 38 So. 454.

39. Smith v. Smith, 79 Mass. (13 Gray) 209.

40. Drake v. Drake, 76 N. H. 32, 78 A. 1071; Conner v. Pozo, 114 La. 562, 38 So. 454.

But a defendant in a divorce suit who sets up the nullity of the marriage through fraud cannot bring a separate suit for nullity in another county. Van Slyke v. Van Slyke, 186 Mich. 324, 152 N. W. 921.

41. Weigel v. Weigel, 65 N. J. Eq. 398, 54 A. 1125, 63 N. J. Eq. 677, 52 A. 1123.

42. Sworoski v. Sworoski, 75 N. H. 1, 70 A. 119; Drake v. Drake, 76 N. H. 32, 78 A. 1071 (even although decree *nisi* has been entered in first suit). See Flaxel v. Flaxel (Neb.), 165 N. W. 159.

43. Main v. Main (Ia.), 163 N. W. 364.

§ 1686. Proceedings for Separation.

The pendency of an action for separation is no bar to a suit for divorce between the same parties,[44] or to a suit by the wife on a contract by the husband to pay her a weekly amount,[45] and one against whom a decree for separation has been rendered may be entitled to divorce on waiting the requisite time and showing that no reconciliation has been effected.[46]

In the same way the pendency of a suit for divorce does not abate an action for separation,[47] and an action for divorce from bed and board brought by the wife is not abated by an action already brought by the husband for divorce *a vinculo,* as a counterclaim need not be set up in the original action, but may be asserted in a separate action.[48] The pendency of an action for absolute divorce does not prevent the defendant in that suit from bringing an action for divorce from bed and board in another county where she lives. The relief sought in the later action is not the same as that sought in the earlier, and may be dependant on a different state of facts. It is in general true that the pendency of an action seeking one kind of divorce does not necessarily forbid the maintenance of a suit to secure a divorce of a different kind.[49]

§ 1687. That Marriage Was One of Convenience Only.

The fact that a wife married merely as a matter of convenience does not affect the validity of the marriage or her right to a divorce.[50]

§ 1688. That Divorce Proceedings Induced by Another.

The fact that the plaintiff was induced by another to commence

44. Hall v. Hall, 135 N. Y. S. 741, 150 App. Div. 688.

45. Hoffman v. Nestel, 146 App. Div. 305, 130 N. Y. Supp. 775 (although the suit for separation also asks for alimony).

46. Raymond v. Carrano, 112 La. 869, 36 S. 787.

47. Cook v. Cook, 159 N. C. 46, 74 S. E. 639.

48. Cook v. Cook, 159 N. C. 46, 40 L. R. A. (N. S.) 83, 74 S. E. 639, Ann. Cas. 1914A, 1137.

49. Cook v. Cook (N. C.), 74 S. E. 639, 40 L. R. A. (N. S.) 83.

50. Ryan v. Ryan, 156 Mo. App. 655, 137 S. W. 1014.

divorce proceedings is not a defence unless the influence was undue, overpowering the will.[51]

§ 1689. Effect on Wife's Reputation.

The fact that the divorce will affect the wife's reputation is not a valid objection thereto.[52]

51. Powell v. Powell (Tex. Civ. App.), 170 S. W. 111.

52. Glenn v. Glenn, 84 Wash. 215, 146 P. 619.

CHAPTER XXIV.

CONDONATION.

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§ 1690. Condonation, Nature and Elements of.

Condonation is the conditional forgiveness or remission, by one spouse, of some matrimonial offence of which he or she knows the other to be guilty. And the rule is that while the condition of forgiveness remains unbroken by the former offender, condonation, from whatever motive it may have proceeded, remains an absolute barrier to all divorce remedies founded on that particular grievance. To this extent condonation is accordingly available in defence; the offence itself not being necessarily denied.[53]

53. Whether condoned offence can be set up in recrimination, see *post*, § 1729; Davis v. Davis, 134 Ga. 804, 68 S. E. 594; Doose v. Doose, 198 Ill. App. 387; Ellithorpe v. Ellithorpe (Ia. 1904), 100 N. W. 328 (no condonation where past not discussed and no promise made for future). See Ferguson v. Ferguson, 145 Mich. 290, 108 N. W. 682, 13 Det. Leg. N. 453 (condition of condonation broken); Weber v. Weber, 195 Mo. App. 126, 189 S. W. 577; Bliss v. Bliss, 161 Mo. App. 70, 142 S. W. 1081; Gardner v. Gardner,

§ 1691. Condonation Is Favored in the Law.[54]

And is a privilege of the injured party alone.[55] Where the libellee proves condonation he is entitled to a verdict in his favor in a divorce suit,[56] but it is no defence to an action for annulment of a marriage.[57]

§ 1692. Connivance at Adultery.

Connivance at acts of adultery constitutes condonation.[58]

9 N. D. 192, 82 N. W. 872; Kostachek v. Kostachek, 40 Okla. 747, 140 P. 1021; Egidi v. Egidi, 37 R. I. 481, 93 A. 908; Parker v. Parker (Tex. Civ. App.), 204 S. W. 493; Bingham v. Bingham (Tex. Civ. App.), 149 S. W. 214 (applies to cruelty); Owens v. Owens, 96 Va. 191, 31 S. E. 72 (cruelty is cumulative — may be forgiven up to a certain point and then all brought forward on a continuance); Ferrers v. Ferrers, 1 Hag. Con. 130; D'Aguilar v. D'Aguilar, 1 Hag. Ec. 773; Johnson v. Johnson, 4 Paige, 460; Sewall v. Sewall, 122 Mass. 156; Ridgway v. Ridgway, 29 W. R. 612; Rogers v. Rogers, 122 Mass. 423; Clouser v. Clapper, 59 Ind. 548; Warner v. Warner, 31 N. J. Eq. 225; Farnham v. Farnham, 73 Ill. 497.

Condonation applies to cruelty, except that the cruelty is condoned only until the particular act is repeated. Murchison v. Murchison (Tex. Civ. App.), 171 S. W. 790.

54. Bishop v. Bishop, 144 N. Y. S. 143, 82 Misc. 676.

55. McLaughlin v. McLaughlin (N. J. Ch.), 107 A. 260.

56. Davis v. Davis, 134 Ga. 804, 68 S. E. 594; Schaub v. Schaub, 117 La. 727, 42 So. 249; Griffith v. Griffith, 77 Neb. 180, 108 N. W. 981; Costello v. Costello 191 Pa. St. 379, 43 A. 240, 44 W. N. C. 202. See Hill v. Hill, 113 La. 770, 36 So. 678.

A complainant may be entitled to divorce for extreme cruelty, notwithstanding condonation of defendant's misconduct. Hazelton v. Hazelton, 17 Det. Leg. N. 516, 127 N. W. 297.

57. Millar v. Millar (Cal.), 167 P. 394.

58. Black v. Black (Ala.), 74 So. 338; Broderick v. Broderick (Cal. App.), 181 P. 402; Roote v. Roote, 33 App. D. C. 398, 23 L. R. A. (N. S.) 240; Davis v. Davis, 134 Ga. 804, 68 S. E. 594; Brown v. Brown, 129 Ga. 246, 58 S. E. 825; Eames v. Eames, 133 Ill. App. 665 Skinner v. Skinner, 47 Ind. App. 670, 95 N. E. 128; Hartl v. Hartl, 155 Ia. 329, 135 N. W. 1007; Chapman v. Chapman (Ia.), 165 N. W. 96; Davison v. Davison (Ia.), 165 N. W. 44; Wagner v. Wagner, 130 Md. 346, 100 A. 364; Wellman v. Wellman, 178 Mich. 107, 144 N. W. 493; Stanton v. Stanton (Mich.), 163 N. W. 873; Eistedt v. Eistedt, 153 N. W. 676; Dunn v. Dunn, 150 Mich, 476, 14 Det. Leg. N. 767, 114 N. W. 385; Herriford v. Herriford, 169 Mo. App. 641, 155 S. W. 855; Dimmitt v. Dimmitt, 167 Mo. App. 94, 150 S. W. 1107; Viertel v. Viertel, 123 Mo. App. 63, 99 S. W. 759; Kennedy v. Kennedy, 182 S. W. 100; Meek v. Meek,

§ 1693. Knowledge of Offence.

The chief circumstance of importance in all cases of condonation, and an all-important one in cases where the offence was adultery, is that of a permitted cohabitation after knowledge of the offence. The general rule is that any cohabitation with the guilty party, after the commission of a matrimonial offence, if it be upon the injured party's knowledge or belief that adultery was committed, will amount to conclusive evidence that the offence in question has been conditionally forgiven.[59] No man, says the law, referring to the case of adultery, that most commonly considered under this head, would take a delinquent wife to his bed unless he had really forgiven her; and the same usually holds true of the wife in these days, where the husband was the delinquent instead.

This cohabitation must have occurred not only after the offence was committed, but after the injured party knew, or had reason to believe, that the other spouse was guilty thereof. Circum-

186 Mo. App. 703, 172 S. W. 1154; Elder v. Elder (Mo. App.), 186 S. W. 530; McNamara v. McNamara, 93 Neb. 190, 139 N. W. 1045; Anderson v. Anderson, 89 Neb. 570, 131 N. W. 907; Page v. Page, 167 N. C. 346, 83 S. E. 625; Jones v. Jones, 173 N. C. 279, 91 S. E. 960; Mosher v. Mosher, 16 N. D. 269, 113 N. W. 99, 12 L. R. A. (N. S.) 820; Estee v. Estee, 34 Okla. 305, 125 P. 455; Penn v. Penn, 37 Okla. 650, 133 P. 207; Augenstein v. Augenstein, 45 Pa. Super. Ct. 258; Egidi v. Egidi, 37 R. I. 481, 93 A. 908; Oster v. Oster (Tex. Civ. App. 1910), 130 S. W. 265; Cozard v. Cozard, 48 Wash. 124, 92 P. 935; Averbuch v. Averbuch, 80 Wash. 257, 141 P. 701. See Briggs v. Briggs, 56 Wash. 580, 106 P. 126 (lewd acts of wife in presence of husband).

Where the conduct of the husband consists in a series of acts the fact that she agreed to live with him until action brought is not condonation. Quient v. Quient (Wash.), 177 P. 779.

Where a husband wilfully deserts his wife, and his desertion, if continued the requisite time, would ripen into a cause of divorce, he waives any condonation of his previous offences against the marriage state. Mathewson v. Mathewson, 81 Vt. 173, 69 A. 646.

The voluntary dismissal of a suit by a wife for divorce for cruelty, and her return to her husband, did not affect her right to subsequently bring a similar action, nor prevent consideration in such action of the entire story of her married life. Goeldner v. Goeldner, 158 Ia. 415, 139 N. W. 889.

59. Beeby v. Beeby, 1 Hag. Ec. 789; Delliber v. Delliber, 9 Conn. 233.

stances arousing the innocent partner's suspicions are insufficient; for, while in this frame of mind, one might well avoid altercation for the sake of eliciting better the truth, or perhaps completing the proof essential to a suit so painful in arousing antagonism as that for divorce must always be. Hence it is said that for cohabitation to bar the husband's remedy, it should be continued with his knowledge, not only of the offence committed, but of his ability to prove it,[60] but mere suspicious circumstances are not enough,[61] as where the husband tells the wife that his venereal disease was an innocent cause and she believes him.[62] The knowledge upon which a further cohabitation affords presumption of condonation, however, is probable knowledge as courts usually state it.[63] The limitation seems to be thus stated, however, in order that the injured spouse may not stultify himself by believing against evidence; for, after all, judicial investigation should be directed to the point whether the innocent spouse chose to forgive, believing that the exercise of forgiveness was at his option.

Condonation takes place after clear and convincing knowledge of the offence is brought home to the libellant, who thereafter cohabits with the libellee,[64] and full knowledge of the serious

60. Quincy v. Quincy, 10 N. H. 272. And see Lord Stowell, in Elwes v. Elwes, 1 Hag. Con. 269; Ellis v. Ellis, 4 Swab. & T. 154.

61. Diggs v. Diggs, 175 N. Y. S. 791; Harris v. Harris, 82 N. Y. S. 568, 83 App. Div. 123; Gosser v. Gosser, 183 Pa. 499, 38 A. 1014, 41 Wkly. Notes Cas. 370 (where husband for a time accepted wife's explanations).

62. Andros v. Andros, 1 Cal. App. 309, 82 P. 90; Wilkins v. Wilkins (N. J. Ch. 1904), 58 A. 821; Laycock v. Laycock, 52 Ore. 610, 98 P. 487.

63. Shelford Mar. & Div. 445; Dillon v. Dillon, 3 Curt. Ec. 86; Best v. Best, 1 Add. Ec. 411.

64. Knowles v. Knowles, 6 Del. Boyce's, 458, 100 A. 569; Phelps v. Phelps, 28 App. D. C. 577; Stanley v. Stanley, 115 Ga. 990, 42 S. E. 374; Hunter v. Hunter, 121 Ill. App. 380; Eames v. Eames, 133 Ill. App. 665; McAninch v. McAninch (Ia. 1906), 108 N. W. 232; Day v. Day, 71 Kan. 385, 80 P. 974; Toulson v. Toulson, 93 Md. 754, 50 A. 401; Maglathlin v. Maglathlin, 138 Mass. 299 (husband cannot wait and confront wife with evidence before he ceases cohabitation); McDuffee v. McDuffee, 169 Mich. 410, 135 N. W. 242; Speiser v. Speiser, 188 Mo. App. 328, 175 S. W. 122; Bordeaux v. Bordeaux, 30 Mont. 36, 32 Mont. 159, 75 P. 524, 80 P. 6; Greims v. Greims, 80 N. J. Eq. 233, 83 A. 1001, reversing decree (Ch.) 80

nature of the offence before the renewed cohabitation must appear.[65]

§ 1694. Renewal of Cohabitation.

Perfect condonation should appear not only by express forgiveness but by renewal of cohabitation.[66]

Continuance of cohabitation for a long period after the acts relied on will constitute condonation,[67] while continuance for a

N. J. Eq. 331, 79 A. 1048; Clark v. Clark, 78 N. J. Eq. 304, 81 A. 1126; Bridge v. Bridge, 93 A. 690; Newton v. Newton, 86 N. J. Ch. 129, 97 A. 294; Todd v. Todd (N. J. Ch.), 37 A. 766; Frost v. Frost, 85 N. J. Eq. 571, 96 A. 1010; Beebe v. Beebe, 160 N. Y. S. 967, 174 App. Div. 408; Harris v. Harris, 82 N. Y. S. 568, 83 App. Div. 123; Karger v. Karger (Sup.), 44 N. Y. S. 219, 26 Civ. Proc. R. 161, 19 Misc. 236; Johnston v. Johnston, 116 Va. 678, 82 S. E. 694; Canning v. Canning, 87 Vt. 492, 89 A. 1088; Rogers v. Rogers, 81 Wash. 502, 142 P. 1150.

A wife did not condone her husband's adultery by continuing to live with him under the belief that his conduct had ceased when in fact it had not. Howard v. Howard, 188 Mo. App. 564, 176 S. W. 483.

65. Beeler v. Beeler, 19 Ky. Law Rep. 1936, 44 S. W. 136; Connelly v. Connelly, 98 Mo. App. 95, 71 S. W. 1111; Merrill v. Merrill, 58 N. Y. S. 503, 41 App. Div. 347; Laycock v. Laycock, 52 Ore. 610, 98 P. 487.

66. Mathy v. Mathy, 88 Ark. 56, 113 S. W. 1012; Whinnery v. Whinnery, 21 Cal. App. 59, 130 P. 1065; Truitt v. Truitt, 154 Ill. App. 242; May v. May, 108 Ia. 1, 78 N. W. 703, 75 Am. St. R. 202; Millet v. Millet (La.), 81 So. 400 Osborn v. Osborn, 174 Mass. 399, 54 N. E. 868 (mere conditional promise is not enough); Jobb v. Jobb (Mich.), 165 N. W. 672; Holschbach v. Holschbach, 134 Mo. App. 247, 114 S. W. 1035; Anderson v. Anderson, 89 Neb. 570, 131 N. W. 907; Taber v. Taber (N. J. Ch. 1904), 66 A. 1082; Potts v. Potts (N. J. Ch. 1899), 42 A. 1055 (articles of separation not a condonation); Geoger v. Geoger, 59 N. J. Eq. 15, 45 A. 349 (mere promise to reinstate wife not enough); Dority v. Dority (Tex. Civ. App. 1901), 62 S. W. 106.

67. Price v. Price, 127 Ark. 506, 192 S. W. 893; Shirey v. Shirey, 87 Ark. 175, 112 S. W. 369; Phillips v. Phillips, 102 Ark. 679, 144 S. W. 914; Duberstein v. Duberstein, 171 Ill. 133, 49 N. E. 316, reversing 66 Ill. App. 579 Klekamp v. Klekamp, 275 Ill. 98, 113 N. E. 852; Abbott v. Abbott, 192 Ill. 439, 61 N. E. 350 (three years); Hunt v. Hunt, 211 Ill. App. 410; *In re* Adams Estate, 161 Ia. 88, 140 N. W. 872; Root v. Root, 164 Mich. 638, 130 N. W. 194, 17 Det. Leg. N. 1222; Griffin v. Griffin, 177 Mich. 623, 143 N. W. 603; Weber v. Weber, 195 Mo. App. 126, 189 S. W. 577; Davis v. Davis (Mo. App.), 206 S. W. 580; Leech v. Leech, 82 N. J. Eq. 472, 89 A. 51 (unless under duress); Murchison v. Murchison (Tex. Civ. App.), 171 S. W. 790; Johnsen v. Johnsen, 78

short time may not.[68] The presumption is that spouses occupying the same dwelling-house or place of abode cohabit in the full nuptial sense; but that presumption is not conclusive and admits of rebuttal,[69] and sleeping in the same house, but in a separate room from the spouse, is not condonation.[70]

§ 1695. Cohabitation Pending Divorce.

Cohabitation pending the divorce suit condones the offence,[71] even where the condonation took place after commencement of the action for divorce.[72]

§ 1696. Offer to Renew Cohabitation; Forgiveness.

A mere offer of reconciliation by the wronged spouse may constitute condonation,[73] and cruelty in one may be condoned by the other party soliciting reconciliation and renewing cohabitation,[74] but according to the weight of authority an unaccepted offer to resume intercourse is unavailable to the offender as amounting to condonation, until that offer is accepted, and hence the offer itself may meantime be withdrawn.[75] Express forgiveness, however, although at once revoked and without renewal of sexual intercourse, is condonation.[76]

Wash. 423, 139 P. 189, rehearing denied, *Id.* 1200. See Wagner v. Wagner, 6 Mo. App. 573 (memorandum).

68. Wolverton v. Wolverton, 163 Ind. 26, 71 N. E. 123 (one night); Hann v. Hann, 58 N. J. Eq. 211, 42 A. 564.

69. Westmeath v. Westmeath, 4 Eng. Ec. 238; Poynter Mar. & Div. 236; Rogers v. Rogers, 122 Mass. 423; Burns v. Burns, 60 Ind. 259.

70. Lindsay v. Lindsay, 226 Ill. 309, 80 N. E. 876; Brown v. Brown, 164 Ill. App. 589; Mattes v. Mattes, 121 Ill. App. 400; Faulkner v. Faulkner, 90 Wash. 74, 155 P. 404; Dance v. Dance, 1 Hag. Ec. 794, *n.*; Westmeath v. Westmeath, 4 Eng. Ec. 238.

71. Fullhart v. Fullhart, 109 Mo. App. 705, 83 S. W. 541.

72. Jones v. Jones, 59 Ore. 308, 117 P. 414.

73. Shirey v. Shirey, 87 Ark. 175, 112 S. W. 369; Maxwell v. Maxwell, 84 S. E. 251. See Burns v. Burns, 38 Pa. Super. Ct. 221.

74. Runkle v. Runkle, 96 Mich. 493, 56 N. W. 2.

75. Popkin v. Popkin, 1 Hag. Ec. 766; Quarles v. Quarles, 19 Ala. 363. But see Christianberry v. Christianberry, 3 Black. 202.

76. Bush v. Bush (Ark.), 205 S. W. 895.

So if the wife leaves the husband under an agreement that should she refrain for three months from using intoxicating liquors he will take her back, and she does so refrain and goes back, and he refuses to receive her, this is condonation of her previous drunkenness.[77]

§ 1697. Acts Less Than Cohabitation.

Other circumstances, or express words and acts, may strengthen or weaken, as the case may be, that presumption of condonation which cohabitation of itself affords. Condonation may be inferred, for instance, from neglecting to prosecute a divorce suit already commenced,[78] or from dismissing it; the result of which, according to the better reason, would be, not that the plaintiff becomes wholly barred from prosecuting the libel, but that, upon violation of the condition of pardon, a divorce libel may be brought for the earlier as well as the later offence.[79]

Affectionate letters are not enough to show condonation,[80] or undertaking household duties.[81] What constitutes condonation of cruelty is a question of fact.[82]

§ 1698. Sexual Intercourse Alone.

Sexual intercourse without cohabitation,[83] or even sexual intercourse without forgiveness,[84] is condonation.

77. Merriam v. Merriam, 207 Ill. App. 474.

78. Walker v. Walker, 2 Phillim. 153.

79. Sewall v. Sewall, 122 Mass. 156.

80. Smith v. Smith, 119 Cal. 183, 48 P. 730; Hunter v. Hunter, 132 Cal. 473, 64 P. 772.

81. Miles v. Miles, 101 Ill. App. 406.

82. Smith v. Smith, 119 Cal. 183, 48 P. 730; Forrester v. Forrester, 101 Miss. 155, 57 So. 553.

83. Reed v. Reed, 62 Ark. 611, 37 S. W. 230; Phelps v. Phelps, 28 App. D. C. 577; *contra*, Weber v. Weber, 195 Mo. App. 126, 189 S. W. 577 (two nights).

A single voluntary act of sexual intercourse by the innocent spouse, after separation on account of cruel conduct constituting grounds for divorce, operates to condone the cruelty. Shirey v. Shirey, 87 Ark. 175, 112 S. W. 369; Reed v. Reed, 62 Ark. 611, S. W. 369.

84. Rogers v. Rogers, 67 N. J. Eq. 534, 58 A. 822.

§ 1699. What Acts Covered by Condonation.

Several matrimonial offences may be condoned together; and various secret acts of adultery or habitual adultery, with a certain person or persons, may thus be forgiven without actual knowledge of each distinct act; provided only that the proof be appropriate to a condonation so extensive.[85] Hence reconciliation after general admissions by the guilty party of infidelity condones all past offences, both those known and those unknown at the time,[86] but a condonation of an offence does not cover an aggravation of it.[87]

§ 1700. Impotency.

Impotency is not condoned even by long continued cohabitation.[88]

§ 1701. Not Readily Inferred Against Wife.

The rule as to inferences of condonation has always been more stringently enforced against the husband than against the wife, and upheld, moreover, chiefly in instances of discovered adultery on her part. Such infidelities rarely fail to place a wife at the absolute mercy of an offended husband, who by throwing her off will make her a social outcast. The husband who condones his wife's adultery is commonly regarded as a disgraced man. But the wife, in a corresponding case, it has lately been remarked, should be pitied rather than blamed, and, especially where she has no separate means, she may be presumed to yield to circumstances beyond her control and hide her shame in patience, with the hope of reclaiming the offender.[89] Upon such a distinction turn

85. See Rogers v. Rogers, 122 Mass. 443.

86. Moorhouse v. Moorhouse, 90 Ill. App. 401.

87. Muir v. Muir, 28 Ky. Law Rep. 1355, 92 S. W. 314, 4 L. R. A. (N. S.) 909 (adultery followed by communication of syphilis).

88. *Impotency.* Cohabitation of the parties for 10 years after marriage held not a bar to an action for divorce upon the ground of matrimonial desertion through refusal to remove a phyhical impediment to the consummation of the marriage. Yawger v. Yawger, 86 A. 419.

89. Miles v. Miles, 101 Ill. App. 406; Doose v. Doose, 198 Ill. App. 387; Horne v. Horne, 72 N. C. 531; McLanahan v. McLanahan, 104 Tenn. 217, 56 S. W. 858 (where wife left husband a few weeks after his false

numerous cases which seem to favor the offended wife who cohabits knowingly with an adulterous partner, by declining to draw so readily the presumption that by doing thus she has intentionally condoned and debarred herself conditionally of the right to institute divorce proceedings for the offence.[90]

And yet, the tendency of our times being to place the sexes on an equal footing of right and responsibility, condonation of a husband's adultery, as well as of a wife's, may doubtless be warranted by inference from circumstances of which continuous cohabitation is the chief; and in some instances of the kind the presumption seems to be upheld almost as strongly against the aggrieved spouse of one sex as of the other.[91] And, at all events, no wife can be justified in permitting her husband's concubine to share with her the same house and a polluted bed.[92]

That marital control and the power to exercise it are given by God's universal law to man rather than woman is the fundamental reason, and a sound one, too, for presuming condonation less readily in a wife than a husband. No condonation, as we have suggested, can be effectual unless voluntary. Hence, a disinclination of courts, in the later cases which have raised that issue, to extend the former presumptions arising out of cohabitation to the case of cruelty. And though the wife should continue cohabiting with her husband after his acts of legal cruelty towards her, it is held that reconciliation should not be conclusively presumed as a barrier to divorce from that circumstance,[93] especially where the cohabita-

charge against her of infidelity). See Hooe v. Hooe, 122 Ky. 590, 92 S. W. 317, 29 Ky. Law Rep. 113, 5 L. R. A. (N. S.) 909.

90. D'Aguilar v. D'Aguilar, 1 Hag. Ec. 733; Wood v. Wood, 2 Paige, 108; Gardner v. Gardner, 2 Gray, 434; Horne v. Horne, 72 N. C. 531; Cochran v. Cochran, 35 Ia. 477.

91. In Rogers v. Rogers, 122 Mass. 423, a full condonation of the husband's prior adulterous misbehavior was deduced from proof that a wife had occupied the same sleeping-room with her husband for three years after discovering that he had a venereal disease, and upon his general admission of marital unfaithfulness.

92. Kirkwall v. Kirkwall, 2 Hag. Con. 277.

93. Snow v. Snow, per Dr. Lushington, 2 Notes Cas. Suppl. 1, 15; Reynolds v. Reynolds, 4 Abb. (N. Y.) App. 35; Farnham v. Farnham, 73

tion is continued in the hope of better treatment,[94] and forbearance of the wife to abandon her husband and bring suit is not always condonation.[95] Fear, indeed, or the husband's coercion, or the shame of an exposure, may have restrained her; nor is the offence itself such as a generous mind can readily forgive before there is opportunity to forget. We cannot doubt, however, that upon suitable proof of favoring circumstances simply, such as long lapse of time and continuous cohabitation after the cruel act was committed, condonation may be established against a wife as well as a husband, and for this offence as well as any other.[96] And as to statutory cause for divorce in general, a continuance, or renewal of cohabitation between the parties, may, under favoring accompaniments, be construed into condoning the fault; for reconciliation is human nature's own plea against justice wherever the family relation is concerned.[97]

§ 1702. Wife Unable to Leave at Once.

Since condonation must be a voluntary act, continued cohabitation after knowledge of an offence, which is constrained by fear or sickness, or the use of force by the offender, cannot be construed

Ill. 497; Phillips v. Phillips, 1 Ill. App. 245; Hollister v. Hollister, 6 Pa. St. 449.

94. Shirey v. Shirey, 87 Ark. 175, 112 S. W. 369; Lynch v. Lynch, 138 La. 1094, 71 So. 195; Austin v. Austin, 172 Mich. 620, 138 N. W. 215 (efforts to get along with husband); Bliss v. Bliss, 161 Mo. App. 70, 142 S. W. 1081.

95. Doose v. Doose, 198 Ill. App. 387.

96. See Gardner v. Gardner, 2 Gray, 434.

97. Scarcely any cases are to be found which apply the principle of condonation to desertion and kindred offences, and the inapplication here of cohabitation, except by way of renewed intercourse, is obvious. But in Kennedy v. Kennedy, 87 Ill. 250, it was recently held that where a wife without justification refused for more than two years to go to her husband's new home, the fact of his cohabiting with her on one occasion at her brother's house did not bar him of the right to a decree of divorce.

Statutes are found relative to condonation in North Carolina and Louisiana; chiefly with the view of giving to condonation the effect of an absolute barrier to divorce for the condoned offence. See Collier v. Collier, 1 Dev. Eq. 352; Bienvenu v. Buisson, 14 La. Ann. 386.

into forgiveness, while that sickness or constraint operates against such spouse's free will;[98] and where the continuance of marital relations was a matter of necessity there is no condonation.[99]

Hence there is no condonation where the wife is so injured by the cruel treatment of her husband that she cannot leave her bed for some time and leaves as soon as she is well enough to do so,[1] or where the husband's ill treatment renders the wife irresponsible and she leaves him as soon as she recovers.[2]

§ 1703. Revival by Repetition of Offence.

The condonation is revoked by a repetition of the offence condoned,[3] but this rule does not apply to desertion, as condonation completely renews the marriage relation, and a subsequent desertion must have continued the statutory period before it is cause for divorce.[4]

The revival of the offence condoned may take place by repetition even a long period after the condonation,[5] but cohabitation for several years may estop from reviving the offence condoned.[6]

98. Turner v. Turner, 2 Spinks, 201. Condonation of a wife's adultery with one person is no defence to an action against another for criminal conversation. Clouser v. Clapper, 59 Ind. 548.

99. Breedlove v. Breedlove, 27 Ind. App. 560, 61 N. E. 797.

1. Satterwhite v. Satterwhite (La.), 80 So. 547.

2. Mahurin v. Mahurin (Tex. Civ. App.), 208 S. W. 558.

3. Andrews v. Andrews, 120 Cal. 184, 52 P. 298; Harding v. Harding, 26 Colo. 106, 85 P. 423; Ellithorpe v. Ellithorpe (Ia. 1904), 100 N. W. 328; Craig v. Craig, 129 Ia. 192, 105 N. W. 446, 2 L. R. A. (N. S.) 669; Smith v. Smith, 167 Mass. 87, 45 N. E. 52; Osborn v. Osborn, 174 Mass. 399, 59 N. E. 868; Clark v. Clark, 191 Mass. 128, 77 N. E. 702 (where adultery committed in State condoned and followed by adultery committed in other States); Creyts v. Creyts, 133 Mich. 4, 94 N. W. 383, 10 Det. Leg. N. 76; Twyman v. Twyman, 27 Mo. 383; Gardner v. Gardner, 9 N. D. 192, 82 N. W. 872; Apgar v. Apgar (N. J. Ch. 1904), 59 A. 230; Seeburger v. Seeburger, 57 N. J. Eq. 631, 42 A. 728; Edleman v. Edleman, 125 Wis. 270, 104 N. W. 56.

4. Laflamme v. Laflamme, 210 Mass. 156, 96 N. E. 62.

5. Neeley v. Neeley (Cal.), 176 P. 163 (three years).

6. Abbott v. Abbott (Mich.), 168 N. W. 950.

Where the repetition of the acts condoned was brought about in part by the acts of the other spouse the condonation may remain.[7]

§ 1704. What Acts Cause Revival.

The condition to be usually inferred from the circumstances, and the implied condition which the present doctrine rests firmly upon, is that the offence shall not be repeated. A repetition of the same injury will certainly do away the condonation, and revive the former grievance as matter for divorce. In other words, the injured spouse is presumed to have trusted to the offender's sense of shame and genuine repentance. But does that repentance extend by implication so as to exact from the offender conjugal kindness in all other respects? Upon this point there have been differences of judicial opinion. The English doctrine is, that the condition of condonation for an act of adultery is broken, not only when a new offence of the same nature is committed, but when the guilty husband afterwards practices cruelty, deserts, or otherwise commits a marital offence.[8] Such a rule of construction it is found desirable to apply when the condoned act would have been visited with total divorce, but that subsequent with only partial divorce, so that the injured party would not otherwise receive just redress for an aggravated wrong. Hence, perhaps, what might seem otherwise a forced construction of the implied compact of forgiveness, but a construction most commonly accepted, nevertheless, in the United States, though not, we apprehend, accepted[9] in all parts of this country, nor ever perhaps needful to insist upon where the later offence may be visited with a decree as full and final as the earlier.

With more confidence it may be added that a new offence kindred

7. Nehrbass v. Nehrbass, 45 App. D. C. 458.

8. 2 Kent Com. 101; Sir John Nicholl, in Durant v. Durant, 1 Hag. Ec. 733; Dr. Lushington, in Bramwell v. Bramwell, 3 Hag. Ec. 618; Dent v. Dent, 4 Swab. & T. 105; Newsome v. Newsome, L. R. 2 P. & D. 306. The subject is, however, considered almost entirely with reference to adultery followed by cruelty

9. See Johnson v. Johnson, 1 Edw. Ch. 439; reversed 4 Paige, 460; but confirmed once more 14 Wend. 637;

to the original need not be proved to the same point of heinousness as the original. Thus, cruelty renewed even slightly, after condonation of such an offence, attests the failure of forbearance the most kind and generous an aggrieved spouse can practice, and so disastrous an experiment may well give rise to the worst apprehensions of danger.[10]

Any misconduct not necessarily of the same class as that condoned will revive the condoned offence,[11], even where the subsequent acts do not form an independent cause of divorce,[12] as condonation is conditioned on future treatment with conjugal kindness,[13] but slight acts of coldness or unkindness will not revive.[14]

Condoned adultery and cruelty, too, may be revived by subsequent misconduct which falls short of adultery.[15] For the injured spouse, as it was observed in an American case, has a right to judge of the future by the past, and the court will connect the whole of the unfaithful partner's conduct in order to form a correct judgment.[16] Judicial inclination, on the whole, is to give to the injured one whose experiment of generosity has thus failed the ample benefit of the original breach of conjugal duty.

Hofmire v. Hofmire, 7 Paige, 60; Odom v. Odom, 36 Ga. 286; Warner v. Warner, 31 N. J. Eq. 225.

10. Robbins v. Robbins, 100 Mass. 150; Westmeath v. Westmeath, 4 Eng. Ec. 238; Nogees v. Nogees, 7 Tex. 538; Farnham v. Farnham, 73 Ill. 497.

11. Doose v. Doose, 198 Ill. App. 387.

12. Sullivan v. Sullivan, 34 Ind. 368; Jefferson v. Jefferson, 168 Mass. 456, 47 N. E. 123; Cooper v. Cooper, 17 Mich. 205, 97 Am. Dec. 182; Cochran v. Cochran, 93 Minn. 284, 101 N. W. 179; James v. James (Neb.), 171 N. W. 904.

Subsequent acts of cruelty will revive condoned adultery, although they would not support an original suit for divorce on that ground. Kostachek v. Kostachek, 40 Okla. 747, 140 P. 1021.

13. Moorhouse v. Moorhouse, 90 Ill. App. 401; Fisher v. Fisher, 93 Md. 298, 48 A. 833 (cruelty revives condoned adultery); Parker v. Parker (Tex. Civ. App.), 204 S. W. 493.

14. Stoner v. Stoner, 134 Ga. 368, 67 S. E. 1030 (selling property leaving wife unprovided for); Abbott v. Abbott, 192 Ill. 439, 61 N. E. 350; Bridge v. Bridge, 93 A. 690 (drunkenness and use of vile language will not revive condoned acts).

15. Ridgway v. Ridgway, 29 W. R. 612.

16. Threewits v. Threewits, 4 Des. 560. And see Turton v. Turton, 3 Hag. Ec. 338.

Condonation is, however, a legal deduction more commonly from acts than words; and perhaps under special circumstances the express agreement of the parties, consistently acted upon, may be shown to vary the terms of condonation so as to give its condition greater or less scope; while, at the same time, public policy and the legal disabilities of the mutual contract to which married parties are bound should not be forgotten.[17]

§ 1705. Effect of Revival.

Repetition of the condoned acts after failure of the suit does not revive the suit, but affords grounds for a new suit.[18]

17. See Newsome v. Newsome, L. R. 2 P. & D. 306, as to express condonation under a separation deed to the extent of obliterating a certain adulterous offence.

18. Jones v. Jones, 59 Ore. 308, 117 P. 414.

CHAPTER XXV.

CONNIVANCE OR COLLUSION.

SECTION 1706. Definition.
1707. In General.
1708. Attempt at Collusion.
1709. Agreements to Suppress Evidence and Deceive Court.
1710. Agreeing to Divorce.
1711. Agreements as to Division of Property.
1712. Encouraging Spouse in Adultery.
1713. Obtaining Others to Lure Spouse Into Adultery.
1714. Committing Adultery for Purpose of Creating Evidence.
1715. Cruelty Inducing Adultery by Spouse.
1716. Passive Acquiescence.
1717. Obtaining Evidence.
1718. Catching Spouse by Trap.
1719. Connivance at One Act as Bar to Divorce for Subsequent Acts.
1720. Insincerity or Collusion as a Defence.

§ 1706. Definition.

Connivance, which is a defence most available in cases of adultery, though applying in other instances, may be defined as the corrupt consenting of a married party to that offence of the spouse for which such party afterwards seeks a divorce.[19]

In principle, where there was no corrupt consenting, there no such defence can be appropriate; but in practice, and where inferences must be drawn largely from circumstantial evidence of a negative character, this corrupt consent will be presumed from passive as well as active encouragement of the offence, and conduct amounting in substance to an estoppel.

§ 1707. In General.

It is a defence to an action for divorce that the plaintiff connived

19. Connivance as condonation, see *ante* 1692; Forster v. Forster, 1 Hag. Con. 144; Phillips v. Phillips, 10 Jur. 829; Cairns v. Cairns, 109 Mass. 408.

at the crime charged when adultery,[20] and connivance will also be a defence to other matrimonial offences, as the use of drugs.[21]

§ 1708. Attempt at Collusion.

The fact that the plaintiff attempted to obtain a divorce by collusion with defendant, who refused to agree, is not a defence.[22]

§ 1709. Agreements to Suppress Evidence and Deceive Court.

If husband and wife agreed to suppress pertinent and material evidence, or to take the conduct of the cause from the proper tribunal, or deceive the court and defraud the public, in the course of a divorce suit, this would be a species of collusion positively disadvantageous to marriage, and hence must not prevail,[23] although collusion does not appear by suppression of unimportant evidence.[24] Hence the promise of a defendant in a divorce suit already commenced, or about to be instituted, to make no defence, is void as against public policy; and accordingly the promise of a spouse to pay money upon such a consideration is held unenforce-

20. Klekamp v. Klekamp, 275 Ill. 98, 113 N. E. 852; Eames v. Eames, 133 Ill. App. 665; Riesen v. Riesen, 148 Ill. App. 460; Noyes v. Noyes, 194 Mass. 20, 79 N. E. 814 (arranging opportunity for adultery); Golding v. Golding, 6 Mo. App. 602, memorandum; Salorgne v. Salorgne, 6 Mo. App. 603, memorandum; Viertel v. Viertel, 86 Mo. App. 494 (where paramour retained in employ of husband after confession); Delaney v. Delaney, 71 N. J. 246, 65 A. 217; White v. White, 84 N. J. Eq. 512, 95 A. 197; Shilman v. Shilman, 174 N. Y. S. 385 (where husband had agreed in wife's "get" or Russian divorce); Karger v. Karger, 44 N. Y. S. 219, 26 Civ. Proc. R. 161, 19 Misc. 236 (where husband arranged with owner of building to give sense of security while he spied upon his wife); Armstrong v. Armstrong, 92 N. Y. S. 165, 45 Misc. 260; Richardson v. Richardson, 114 N. Y. S. 912. See Lambert v. Lambert, 145 N. W. 920 (that wife permitted paramour to remain in family home for several days is not adultery).

21. See Gowey v. Gowey, 191 Mass. 72, 77 N. E. 526.

22. Rosenfeld v. Rosenfeld, 67 Mo. App. 29.

23. Sheehan v. Sheehan, 77 N. J. Eq. 411, 77 A. 1063; Goodwin v. Goodwin, 4 Day, 343; Hunt v. Hunt, 39 L. T. 45; Sickles v. Carson, 26 N. J. Eq. 440; Everhart v. Puckett, 73 Ind. 409.

24. Lamere v. Lamere, 41 Wash. 475, 84 P. 26.

able; as is also, between the original parties and those not innocent and for value, a promissory note upon such consideration and no other.[25] The same may be said of agreements or notes given in respect to alimony, for the similar purpose of facilitating a divorce and rendering the terms against the guilty party lighter than they ought to be.[26] All collusive agreements between husband and wife to procure a divorce, when no real ground exists, are a fraud upon the court.[27]

§ 1710. Agreeing to Divorce.

A divorce cannot be granted on consent of parties, but good cause must be shown,[28] and an agreement between the parties for a separation and divorce is collusive and prevents the granting of a divorce.[29]

An agreement as to alimony, however,[30] or to facilitate the proceedings, is not collusion.[31]

25. Stoutenburg v. Lybrand, 13 Ohio St. 228; Kilbourn v. Field, 78 Pa. St. 194; Everhart v. Puckett, 73 Ind. 409.

26. Adams v. Adams, 25 Minn. 72; Sayles v. Sayles, 1 Fost. 312.

27. Yet, after a divorce is granted, the party who would set the judgment aside for such fraudulent collusion, has the burden of proof. Hopkins v. Hopkins, 39 Wis. 167.

28. People v. Case, 241 Ill. 279, 89 N. E. 638; Wolkovisky v. Rapaport, 216 Mass. 48, 102 N. E. 910. See *ante*.

29. Frank v. Frank, 178 Ill. App. 557 (assent to desertion for purpose of obtaining divorce); Gentry v. Gentry, 67 Mo. App. 550; Branson v. Branson, 76 Neb. 780, 107 N. W. 1011; Wiemer v. Wiemer, 21 N. D. 371, 130 N. W. 1015; Griffiths v. Griffiths, 69 N. J. Eq. 689, 60 A. 1090; Latshaw v. Latshaw, 18 Pa. Super. Ct. 465; Pearce v. Pearce, 53 Pa. Super. Ct. 129. See Drayton v. Drayton, 54 N. J. Eq. 298, 38 A. 25.

An antenuptial agreement, whereby the wife was to obtain a divorce, and the husband was not to contest it, cannot be enforced, because it would show collusion between the parties. Donohue v. Donohue, 159 Mo. App. 610, 141 S. W. 465.

Collusion is defined as an agreement to procure a divorce which, if the facts were known the court would not grant. Doeme v. Doeme, 89 N. Y. S. 215, 96 App. Div. 284.

30. Ham v. Twombly, 181 Mass. 170, 63 N. E. 336; Rapp v. Rapp, 162 Mo. App. 673, 145 S. W. 114; Erwin v. Erwin (Tex. Civ. App. 1897), 40 S. W. 53.

31. Dodge v. Dodge, 90 N. Y. S. 438, 98 App. Div. 85. See State v.

§ 1711. Agreements as to Division of Property.

A mere agreement as to division of property in case of divorce is not evidence of connivance.[32]

§ 1712. Encouraging Spouse in Adultery.

Connivance being a charge to which any spouse too readily forgiving a matrimonial wrong becomes exposed, a check is thus imposed by law upon too easy condonation. Condonation may be guiltless, but connivance imports guilt. Yet the difference of presumption from circumstances already noticed between husband and wife under the preceding head extends necessarily to the present. Thus, it was held, where a wife sued for divorce on the ground of her husband's adultery and desertion with a paramour, that it was no defence for the husband to set up that the wife knew of his criminal acts at the time, continued living with him while he was committing them, and by her own conduct not amounting to an assent gave opportunity for the criminal intimacy to ripen.[33]

Yet, as to a husband, another State court held almost contemporaneously that where a man discovers his wife in the act of adultery with another, and does not interrupt nor disclose his discovery to either of them, he may be held to have connived at the guilt, and hence may forfeit his right to a divorce.[34]

To dwell upon the case of the stronger spouse, which is the usual one. If a husband spreads snares for his wife, exposes her purposely to licentious temptation, and surrounds her intentionally with seducers and profligates for her companions, he may well be presumed to be either shamefully indifferent to her virtue, and probably for his own pecuniary gain, or else deliberately planning

Richardson, 122 La. 1064, 48 So. 458 (agreement facilitating proof of offence is collusion).

32. Doose v. Doose, 198 Ill. App. 387.

33. Cochran v. Cochran, 35 Ia. 477; Turton v. Turton, 3 Hag. Ec. 338; Kirkwall v. Kirkwall, 2 Hag. Con. 277; Angle v. Angle, 12 Jur. 525, showing that the English cases deal gently with a wife in respect to the circumstantial inference of connivance.

34. Cairns v. Cairns, 109 Mass. 408.

to get rid of her. All such conduct, though less conclusive of evil intent in a particular instance than offering one's own premises to the paramour, or permitting carnal intercourse to go on uninterrupted, bears upon the main issue, and justifies the strongest presumption against him where all other circumstances correspond.[35] Thus, where the husband, with ample knowledge of the facts of the wife's indiscretions, for business reasons permits her to continue in peril, this will bar him from a divorce,[36] and so where a husband deserts a wife and hires witnesses to catch her in some act of adultery, and expresses satisfaction when she is discovered and remains on terms of friendship with the paramour.[37]

§ 1713. Obtaining Others to Lure Spouse into Adultery.

It is connivance where the adultery is induced by the plaintiff's friends acting on his behalf and with his knowledge,[38] as where the adultery charged is committed with spies hired by the plaintiff, who induce the adultery.[39]

But the mere fact that the defendant went with the plaintiff's detective to commit adultery does not show connivance where he was not employed to induce the adultery and did not do so.[40]

§ 1714. Committing Adultery for Purpose of Creating Evidence.

It is collusion where the defendant commits the offence with the

35. Crewe v. Crewe, 3 Hag. Ec. 123, 137, per Lord Stowell; Harris v. Harris, 2 Hag. Ec. 376; Timmings v. Timmings, 3 Hag. Ec. 76; Bray v. Bray, 2 Halst. Ch. 628.

36. Heimer v. Heimer, 63 Pa. Super. Ct. 476.

37. Donohue v. Donohue, 159 Mo. App. 610, 141 S. W. 465. See Mattison v. Mattison, 113 N. Y. S. 1024, 60 Misc. 573 (mere desertion is not connivance).

38. Schwindt v. Schwindt, 66 Pa. Super. Ct. 217.

39. Dennis v. Dennis, 68 Conn. 186, 36 A. 34, 57 Am. St. R. 95, 34 L. R. A. 449 (though hiring of paramour not expressly directed by plaintiff); May v. May, 108 Ia. 1, 78 N. W. 703, 75 Am. St. R. 202; Torlotting v. Torlotting, 82 Mo. App. 192; Rademacher v. Rademacher, 74 N. J. Eq. 570, 70 A. 687; McAllister v. McAllister, 137 N. Y. S. 833.

40. Tuck v. Tuck, 102 N. Y. S. 688, 117 App. Div. 421.

knowledge of the plaintiff's agent and for the purpose of creating evidence.[41]

§ 1715. Cruelty Inducing Adultery by Spouse.

Mere coolness on his part, or conjugal neglect, or even the cruel abuse of his wife, are circumstances less material, as establishing connivance, nor are they generally admissible; and yet, in connection with more positive testimony of connivance, they might perhaps be put in proof.[42]

§ 1716. Passive Acquiescence.

It is not connivance for the husband to fail to interfere at once with his wife's apparent indiscretions in the absence of evidence that he desired her to go wrong or aided her in doing so,[43] as he has a right to wait to know the truth before acting,[44] and mere passive permission in misconduct to test fidelity is not connivance.[45]

The mere fact that the defendant desires that the divorce be granted and makes no defence is not collusion.[46]

§ 1717. Obtaining Evidence.

Mere acts of watching the movements of a suspected spouse is not connivance,[47] as tolerance of easy virtue in a matrimonial companion, indifference and delay over discovered guilt, must be quite

41. Cowan v. Cowan, 53 N. Y. S. 93, 23 Misc. 754, 6 N. Y. Ann. Cas. 297 (though plaintiff ignorant of collusion between her son and defendant).

42. Moorsom v. Moorsom, 3 Hag. Ec. 87; Austin v. Austin, 10 Conn. 221.

43. Warn v. Warn, 59 N. J. Eq. 642, 45 A. 916 (failure to protect wife not enough); Reierson v. Reierson, 52 N. Y. S. 509, 32 App. Div. 62, 6 N. Y. Ann. Cas. 291; Clawell v. Clawell, 63 Pa. Super. Ct. 88.

44. Brown v. Brown, 63 N. J. Eq. 348, 49 A. 589, 50 A. 608.

45. Herriford v. Herriford, 169 Mo. App. 641, 155 S. W. 855; Dilatush v. Dilatush, 86 N. J. Eq. 346, 98 A. 255.

46. Pohlman v. Pohlman, 60 N. J. Eq. 28, 46 A. 658.

47. Engle v. Engle, 153 Ia. 285, 133 N. W. 654; Torlotting v. Torlotting, 82 Mo. App. 192; Lehman v. Lehman, 78 N. J. Eq. 316, 79 A. 1060.

different from confirming the suspicion of habitual adultery by waiting and watching for legal proof.[48]

§ 1718. Catching Spouse by Trap.

The fact that one laid a trap for the spouse and caught him in the adultery is not connivance.[49]

§ 1719. Connivance at One Act as Bar to Divorce for Subsequent Acts.

There is a doctrine, which divorce courts admit to some extent, whereby the husband who positively connives at one act of adultery on his wife's part, so as to aid in debauching her, becomes debarred from setting up her subsequent adultery against her.[50]

Intention is the point upon which all the light should be directed, and repeated condonation alone may compromise a husband so as to debar him from obtaining a divorce, especially if misconduct with the same paramour be the repeated offence at issue,[51] but connivance at an act of adultery will not usually bar a divorce for a subsequent act.[52]

§ 1720. Insincerity or Collusion as a Defence.

Insincerity is a defence which is frequently found asserted in connection with lapse of time, as where a fictitious suit was brought to give annoyance, or to raise some abstract point of law. A divorce court, scrutinizing the merits of each case, lest the public suffer some detriment, will throw such cases out of court.[53] Moreover, the rule of good faith pledging the parties to contend in earnest, neither of them asserting or admitting false allegations of

48. Cairns v. Cairns, 109 Mass. 408; Stone v. Stone, 1 Robertson, 99.

49. Bateman v. Bateman, 42 App. D. C. 230; Farwell v. Farwell, 47 Mont. 574, 133 P. 958.

50. Hedden v. Hedden, 6 C. E. Green, 61; Stone v. Stone, 1 Robertson, 99.

51. Timmings v. Timmings, 3 Hag. Ec. 76.

52. Viertel v. Viertel, 99 Mo. App. 710, 75 S. W. 187.

53. See Lorenz v. Lorenz, 93 Ill. 376; Shafto v. Shafto, 28 N. J. Eq. 34.

matrimonial unfaithfulness, divorce by collusion is discountenanced.

Such objections to a divorce suit as these, or at all events the latter, are perhaps to be regarded as raised by the public, rather than by a party defendant, who, however, has necessarily the right and the duty of claiming that the charges in the libel are without foundation in point of fact.[54]

54. *Divorce — collusion to defraud courts — effect.* An agreement between married people that one shall bring an action for divorce and the other fail to defend it, and especially upon a ground that is not the real one, is held a collusion to defraud the courts in Edleson v. Edleson, 179 Ky. 300, 200 S. W. 625, which is annotated in 2 A. L. R. 689, on collusion as a bar to divorce.

CHAPTER XXVI.

RECRIMINATION.

SECTION 1721. In General.
1722. Pleading and Proof of Recrimination.
1723. Burden of Proof.
1724. Character of Acts Set Up in Recrimination.
1725. Acts Pending Action as Recrimination.
1726. Recrimination of Cruelty.
1727. Recrimination of Desertion.
1728. Recrimination of Adultery.
1729. Whether a Condoned Offence Can Be Set Up in Recrimination.

§ 1721. In General.

It is a general principle applicable to all divorce proceedings, that the spouse petitioning for relief must have been both clear of blame and consistent in availing himself or herself of the other's matrimonial delinquency. By "clear of blame," we may mean (1) without substantial fault in causing the offence complained of, and, furthermore, (2) free from other misconduct equally reprehensible under the divorce laws. For if both parties have the same right to divorce, the rule is that neither has, since only an innocent spouse may properly ask the court to interpose. If the guilty offender has been forgiven, and upon a condition unbroken, then even the innocent spouse may be precluded from bringing a bill for divorce. Hence, various defences which may be employed against the petitioning spouse, apart from a general denial of the alleged misconduct upon which the petitioner relies. And so flexible is modern divorce procedure found under our codes, that, besides written answers, cross-bills are frequently allowed in aid of the defendant's case, and for the purpose of affirmative relief.

As to recrimination, it is the well-known maxim of equity, whose process, like that before monarchs or legislatures, is invoked by petition or libel, and whose Roman fundamental principles apply to causes in chancery, admiralty, or matrimonial courts

alike, that he who comes into court must come with clean hands. And in common-law suits founded in tort, one perceives that a similar exemption from personal fault or negligence must also appear from the evidence in order to enable the plaintiff to recover. As to divorce, such maxims have a very broad application. So that, following the Mosaic and canon law, our courts of matrimonial jurisdiction, plainly disinclined as they always were to rupturing the marriage tie, have consistently held that the spouse who has violated his or her own marriage vows is in no position to complain that the other has done the same.[55]

The courts will not as a general rule interfere and grant a divorce where the husband and wife have committed reciprocal outrages,[56] but where the quarrels between the parties are caused by the fault of one, the other may have a divorce.[57]

One who had himself broken the marriage contract cannot obtain a divorce,[58] and where the libellant's own evidence shows him to

55. Beeby v. Beeby, 1 Hag. Ec. 789. Such guilty parties, says Chancellor Walworth, in Wood v. Wood, 2 Paige, 108, are "suitable and proper companions for each other."

56. Wilson v. Wilson, 128 Ark. 110, 193 S. W. 504; Healey v. Healey, 77 Ark. 94, 90 S. W. 845 (where it was not unsafe for either to live with the other); Malone v. Malone, 76 Ark. 28, 88 S. W. 840; Stoneburner v. Stoneburner, 11 Idaho, 603, 83 P. 938; Decker v. Decker, 193 Ill. 285, 61 N. E. 1108, 86 Am. St. R. 325, 55 L. R. A. 697, 95 Ill. App. 655; Shoup v. Shoup, 106 Ill. App. 167; McCarty v. McCarty (Ia.), 169 N. W. 135; Anderberg v. Anderberg (Ia.) 1902), 91 N. W. 1071; Day v. Day, 71 Kan. 385, 80 P. 974 (though offences not of same character); Amy v. Berard, 49 La. Ann. 897, 22 So. 48; Kellogg v. Kellogg, 171 Mich. 518, 137 N. W. 249; Barth v. Barth, 168 Mo. App. 423, 151 S. W. 769; Bethel v. Bethel, 181 Mo. App. 601, 164 S. W. 682; Hogsett v. Hogsett (Mo. App.), 186 S. W. 1171; Lawlor v. Lawlor, 76 Mo. App. 637; Wells v. Wells, 108 Mo. App. 88, 82 S. W. 1103 Tracey v. Tracey, 43 A. 713 (although not pleaded in defence); Mosier v. Mosier (Ore.), 174 P. 732; Earle v. Earle, 43 Ore. 293, 72 P. 976; Rayl v. Rayl (Tenn. Ch. App. 1900), 64 S. W. 309 (cross-complaint dismissed where cross-complainant guilty); White v. White (Wis.), 168 N. W. 704. See G—— v. G——, 67 N. J. Eq. 30, 56 A. 736 (adultery is an answer to a charge of impotence, but simple decree granted to each).

57. Prather v. Prather, 99 Ia. 393, 68 N. W. 806.

58. Stoneburner v. Stoneburner, 11 Idaho, 603, 83 P. 938; Loughran v.

have been guilty of misconduct amounting to cause for divorce, the divorce will be refused although the cause relied on is proved,[59] but the rule is in practice often relaxed and the comparative rectitude of the parties considered.[60]

Under a statute giving the court discretion to grant a divorce where the parties have lived apart for many years, recrimination is not necessarily a defence to a petition for divorce,[61] but even under such a statute a divorce will not be granted to the party who was wholly to blame for the estrangement.[62]

§ 1722. Pleading and Proof of Recrimination.

The acts relied on in recrimination should be pleaded and proved as if made a basis for divorce,[63] and the mere suspicious conduct of the plaintiff is not a defence to a libel brought on account of the denial of sexual intercourse.[64]

§ 1723. Burden of Proof.

There is some conflict as to the burden of proving recrimination. It is usually held that the burden is on the plaintiff not only to show the injury but also his own innocence.[65]

Loughran, 134 N. W. 1091; Day v. Day, 71 Kan. 385, 80 P. 974; Miles v. Miles, 137 Mo. App. 38, 119 S. W. 456; Collett v. Collett, 170 Mo. App. 590, 157 S. W. 90; Goings v. Goings, 90 Neb. 148, 133 N. W. 199; Kamman v. Kamman, 151 N. Y. S. 226, judgment modified 152 N. Y. S. 579, 167 App. Div. 423; Crim v. Crim, 66 Ore. 258, 134 P. 13; Hall v. Hall, 69 W. Va. 175, 71 S. E. 103.

59. Lyon v. Lyon, 39 Okla. 111, 134 P. 650; Earle v. Earle, 43 Ore. 293, 72 P. 976.

60. Weiss v. Weiss, 174 Mich. 431, 140 N. W. 587; Staples v. Staples (Tex. Civ. App. 1911), 136 S. W. 120. *A divorce may be granted where both parties are blamable*, if they are not equally at fault and the evidence establishes the right of one of them to a divorce. Johnsen v. Johnsen, 78 Wash. 423, 139 P. 189, rehearing denied, *Id.* 1200.

61. Guillot v. Guillot (R. I.), 106 A. 801.

62. Pierce v. Pierce (Wash.), 181 P. 24.

63. De Marco v. De Marco, 101 N. Y. S. 600, 116 App. Div. 304.

64. Nordlund v. Nordlund, 97 Wash. 475, 166 P. 795.

65. Elder v. Elder (Mo. App.), 186 S. W. 530; Libbe v. Libbe, 157 Mo. App. 701, 138 S. W. 685; Speiser v. Speiser, 188 Mo. App. 328, 175 S. W.

It has, however, been stated that extreme cruelty, when offered as an excuse for desertion, is an affirmative defence, and the burden of proving it is on the defendant. The difficulty seems to be caused by the confusion between the burden of going forward with the evidence, which may shift from time to time in the trial, and the burden of proving one's whole case, which throughout rests on the plaintiff.[66]

§ 1724. Character of Acts Set Up in Recrimination.

Recrimination as a defence is available only where the defendant's acts relied on were induced by or in retaliation of the plaintiff's conduct and were of the same general character and such as are reasonably calculated to provoke the defendant's misconduct,[67] but the acts relied on as recrimination must be such as are sufficient ground for divorce.[68] Some of our local statutes are so construed that divorce is denied whenever both parties are guilty of any of the enumerated offences punishable by divorce from bonds of matrimony.[69] And to such a principle our American States seem to tend; Massachusetts, for instance, permitting, if not cruelty, at least desertion, to be alleged in recrimination for adultery, though such desertion must have extended over the full statutory period.[70] This tendency seems most fairly in accordance with a correct apprehension of the recrimination doctrine.

No less evidence is requisite to establish a recriminatory charge made in an answer than would be needful to establish a like charge by cross-bill, or in an original libel for divorce.[71]

122; Richardson v. Richardson, 114 N. Y. S. 912.

66. Rogers v. Rogers (N. J.), 86 A. 935, 46 L. R. A. (N. S.) 711.

67. Staples v. Staples (Tex. Civ. App. 1911), 136 S. W. 120.

68. Cushman v. Cushman, 194 Mass. 38, 79 N. E. 809; Wehrenbrecht v. Wehrenbrecht (Mo. App.), 207 S. W. 290; Hiecke v. Hiecke, 163 Wis. 171, 157 N. W. 747; Egbers v. Egbers, 79 Wash. 72, 139 P. 767.

69. Nagle v. Nagle, 12 Mo. 53.

70. Clapp v. Clapp, 97 Mass. 531; Edgerly v. Edgerly, 112 Mass. 53; Adams v. Adams, 2 C. E. Green, 324; Wilson v. Wilson, 40 Ia. 230.

71. Pollock v. Pollock, 71 N. Y. 137; Buerfening v. Buerfening, 23 Minn. 563.

The defence of recrimination may be made in this country according to the great weight of authority when the libellant has been guilty of any one of the statutory causes of divorce, on the theory that the libellant must himself be guiltless. So cruelty or desertion is a defense to an action for the subsequent adultery of the other party in those States where all three acts are equally causes for divorce,[72] while in States where cruelty or desertion are only grounds for separation they are not defences to an action for divorce.[73] It has been said that no divorce can be had for adultery of the wife where she has been previously deserted by her husband, as this previous desertion might compel her to form a new connection for support,[74] but that this rule no longer holds good where by statute the husband may be compelled to provide her adequate support,[75] and that in that case the husband can obtain his divorce as his desertion of her gives her no license to commit adultery. So a wife guilty of adultery cannot obtain a divorce on any ground,[76] while a wife guilty of adultery may maintain an action for separation.[77]

Where no adultery is claimed, evidence that the libellant had taken one of his female employees to a restaurant and had driven her in his automobile from her home to his office is not misconduct which will bar him from obtaining a divorce.[78]

The defence of recrimination cannot always be made against one who, while married, has sexual intercourse with a woman not his wife, if it was the result of an honest mistake of fact which led him

72. Day v. Day, 71 Kan. 385, 80 P. 974, 6 Ann. Cas. 169; Bordeaux v. Bordeaux, 30 Mont. 36, 75 P. 524; Wilson v. Wilson, 89 Neb. 749, 132 N. W. 401; Church v. Church, 16 R. I. 667, 19 A. 244, 7 L. R. A. 385; Pierce v. Pierce, 70 Vt. 270, 40 A. 728; Pease v. Pease, 72 Wis. 136, 39 N. W. 133.

73. Zimmerman v. Zimmerman, 242 Ill. 552, 90 N. E. 192.

74. Tew v. Tew, 80 N. C. 316, 30 Am. R. 84.

75. Steel v. Steel, 104 N. C. 636; Ellett v. Ellett, 157 N. C. 161, 72 S. E. 861, 39 L. R. A. (N. S.) 1135.

76. Walker v. Walker (Vt.), 104 A. 828.

77. Hawkins v. Hawkins, 96 N. Y. S. 804, 110 App. Div. 42.

78. Nordlund v. Nordlund (Wash.), 166 P. 795, L. R. A. 1918A, 59.

to believe his first marriage ended and to marry a second time and cohabit with another woman in the full belief that she was his lawful wife, provided the circumstances were such that he was justified in his belief that the first marriage had ended and that he had not been negligent or lax in endeavoring to ascertain the actual facts before he entered into the second marriage. But where the wife is put in jail and the husband, without inquiry as to his rights, marries again in the belief that the imprisonment of his wife left him free to marry again, this is not a reasonable mistake, and it is furthermore a mistake of law and not of fact, and a mistake of law cannot excuse one charged with adultery. Therefore the man cannot be given a divorce against his first wife.[79]

§ 1725. Acts Pending Action as Recrimination.

The libelee may set up in recrimination acts occurring after the filing of the suit.[80]

§ 1726. Recrimination of Cruelty.

On principle, cruelty should be proper recrimination for cruelty, though such cases can rarely amount to more than establishing a quarrel and mutual violence.[81] Nor ought retaliation grossly in excess of the provocation even here to be admitted,[82] and one who has been guilty of cruelty will not be granted a divorce for that cause,[83] and where both parties are at fault a divorce will

79. Geisselman v. Geisselman (Md. 1919), 51 Chicago Legal News, 330.

80. Von Bernuth v. Von Bernuth, 76 N. J. Eq. 487, 74 A. 700.

81. Soper v. Soper, 29 Mich. 305.

82. See Hale v. Hale, 47 Tex. 336.

83. Strickland v. Strickland, 80 Ark. 451, 97 S. W. 659; Mattson v. Mattson (Cal.), 183 P. 443; Duberstein v. Duberstein, 171 Ill. 133, 49 N. E. 316, reversing 66 Ill. App. 579; Goeldner v. Goeldner, 158 Ia. 415, 139 N. W. 889; Stepp v. Stepp, 178 Ky. 337, 198 S. W. 935; Rolfsen v. Rolfsen (Ky. 1909), 115 S. W. 213, 1200; Wallner v. Wallner (Mo. App.), 150 S. W. 1082; Wolf v. Wolf (N. D.), 169 N. W. 577 (wilful desertion and neglect by husband); Gordon v. Gordon, 77 N. H. 597, 92 A. 546; Hengen v. Hengen, 85 Ore. 155, 166 P. 525; Tanton v. Tanton (Tex. Civ. App.), 209 S. W. 429; Hartwell v. Hartwell, 25 Utah, 41, 69 P. 265.

be denied,[84] but adultery is a good defence to a charge of cruelty,[85] and is regarded as a good defence for a husband to allege in recrimination against his wife's libel for cruelty, especially if her adultery occurred first;[86] and desertion is a good defence to a charge of cruelty.[87]

Where divorce is sought on account of cruelty, the fact that the defendant makes a charge of adultery which is not proved will not entitle the plaintiff to a divorce where it appears that the charge of adultery was honestly made based on suspicious circumstances.[88]

§ 1727. Recrimination of Desertion.

One guilty of adultery cannot obtain a divorce on account of desertion.[89] So a divorce will not be granted to one who has been

84. Gruner v. Gruner, 183 Mo. App. 157, 165 S. W. 865; Peyton v. Peyton, 97 Neb. 663, 151 N. W. 150 (although defendant more culpable); Matlock v. Matlock, 72 Ore. 330, 143 P. 1010; Hill v. Hill, 57 Pa. Super. Ct. 1; McNabb v. McNabb (Tex. Civ. App.), 207 S. W. 129.

Under the Washington statute providing that a divorce may be granted where further cohabitation appears impossible where each party has mistreated the other both may have a divorce. Schirmer v. Schirmer, 84 Wash. 1, 145 P. 981.

85. Decker v. Decker, 193 Ill. 285, 61 N. E. 1108, 86 Am. St. R. 325, 55 L. R. A. 697; Stiehr v. Stiehr, 145 Mich. 297, 108 N. W. 684, 13 Det. Leg. N. 427; Elder v. Elder (Mo. App.), 186 S. W. 530; *contra*, Henry v. Henry, 17 Abb. Prac. 411 (in action for limited divorce).

86. Johns v. Johns, 29 Ga. 718; Holmes v. Holmes, Walk. 474; Shackett v. Shackett, 49 Vt. 195.

87. Coe v. Coe, 98 Mo. App. 472, 72 S. W. 707; Kaufman v. Kaufman, 160 N. Y. S. 19; Pierce v. Pierce, 70 Vt. 270, 40 A. 728. See Beekman v. Beekman, 53 Fla. 858, 43 So. 923; Richardson v. Richardson, 114 N. Y. S. 912; Stolz v. Stolz, 96 Wash. 227, 164 P. 920 (no recrimination where wife abandoned husband of right after ill-treatment).

88. Johnson v. Johnson, 101 Ky. 623, 42 S. W. 109, 19 Ky. Law Rep. 822. See Wellman v. Wellman, 50 La. Ann. 114, 23 So. 104 (allegations in wife's petition which is dismissed are not ground for separaton suit by husband).

89. Eikenbury v. Burns, 33 Ind. App. 69, 70 N. E. 837; Green v. Green, 125 Md. 141, 93 A. 400. See Shearer v. Shearer (Mo. App.), 189 S. W. 592 (where plaintiff had been unduly attentive to others); Drayton v. Drayton, 54 N. J. Eq. 298, 38 A. 25 (mere belief of infidelity of wife, based on suspicious circumstances, is no defence).

guilty of adultery,[90] although it appears that the cause of the divorce was complete before the adultery, and although it is claimed that the wife's desertion is an inciting cause of the adultery.[91] This is the better American rule, although there are cases holding that adultery is no bar to a divorce for desertion occurring before the adultery.[92] The true rule is that the plaintiff must come into the divorce court with clean hands. Cruelty is also a good defence to a charge of desertion.[93]

Conduct to bar relief in an action for divorce for desertion need not be such as would give the defendant cause for a divorce, as inequitable conduct on the part of the plaintiff, though it does not amount to cause for a divorce, suffices to defeat his application for relief.[94] But the husband is entitled to a divorce for desertion where the wife leaves him and refuses to return unless she can occupy a separate room, and she does not show justification by proving that he insisted on paying the household bills himself and would not allow her money she wanted for the support of herself and children. While the support of the husband was meagre, the mere fact of failure to provide sufficient support for a wife does not constitute desertion by the husband under the New Jersey statute.[95]

§ 1728. Recrimination of Adultery.

When divorce is sought by the one for the other's delinquency, the party who is brought into court may complain of the delinquency

90 Setzer v. Setzer, 128 N. C. 170, 38 S. E. 731, 83 Am. St. R. 666; Mendenhall v. Mendenhall, 12 Pa. Super. Ct. 290; Whippen v. Whippen, 147 Mass. 294, 17 N. E. 644; Tracey v. Tracey (N. J Eq.), 43 A. 713; Smith v. Smith, 4 Paige, 432, 27 Am. Dec. 75.

91. Green v. Green, 125 Md. 141, 93 A 400, L R. A 1915E, 972.

92. Ristine Case, 4 Rawle, 460; Buerfening v. Buerfening, 23 Minn. 563.

93. Arrowsmith v. Arrowsmith (N. J. Ch. 1909), 71 A. 702; Rogers v. Rogers (N. J.), 86 A. 935, 46 L. R. A. (N. S.) 711. See Kessler v. Kessler, 2 Cal. App. 509, 83 P. 257.

94. Hall v. Hall (W. Va.), 71 S. E. 103, 34 L. R. A. (N. S.) 758.

95. Rogers v. Rogers (N. J.), 86 A. 935, 46 L. R. A. (N. S.) 711.

in bar; and this constitutes recrimination. The line, however, is not drawn with exactness, except where the offence in recrimination balances or overbalances the offence originally complained of. Thus, where both plaintiff and defendant were guilty of adultery, no matter which offence took place first, or whether adultery was committed under more heinous circumstances or more frequently by one spouse than the other, the rule is well established that either libellant's suit is barred on that showing.[96]

In general, where the statutory offences alleged in the libel and on recrimination are visited by the same total or the same partial decree, recrimination may be allowed to operate as a bar. But upon such points, and as to the degree of reprobation which policy affixes to certain marital breaches, codes differ, and so likewise must decisions. Leniency to a wife's adultery, however, is thought to be of doubtful expediency in codes of good morals. Even in cases where the wife has wilfully denied, on her part, sexual intercourse to her husband, and deliberately thwarted his natural gratification or desire for offspring, courts have declined to admit such unkindness by way of recrimination for the husband's own adultery, or even his desertion,[97] and this all the more, perhaps, inasmuch as adultery in a woman is held to be the cardinal sin.

But whether cruelty can be set up as recrimination against a

96. Lenning v. Lenning, 176 Ill. 180, 52 N. E. 46, 73 Ill. App. 224, affd.; Fisher v. Fisher, 93 Md. 298, 48 A. 833 (on cross-bill); Geisselman v. Geisselman (Md.), 107 A. 185 (although plaintiff's adulterous marriage was made thinking his first marriage was dissolved); Duncan v. Duncan, 12 Mo. 157; Libbe v. Libbe, 157 Mo. App. 701, 138 S. W. 685; Nolker v. Nolker (Mo. App.), 208 S. W. 128 (husband staying away from home evenings to early in the morning); Hawkins v. Hawkins, 105 N. Y. S. 889, 121 App. Div. 896; Yost v. Yost, 54 Pa. Super. Ct. 365; Oster v. Oster (Tex. Civ. App. 1910), 130 S. W. 265. See House v. House, 131 N. C. 140, 42 S. E. 546 (adultery on two occasions does not constitute living in adultery within statute); Wildey v. Wildey, 26 W. R. 239; Horne v. Horne, 72 N. C. 531; Hale v. Hale, 47 Tex. 336.

97. See Rowe v. Rowe, 4 Swab. & T. 162; Reid v. Reid, 6 C. E. Green, 331; *supra*, § 1611. This, to be sure, is because such denial is not coequal cause for divorce with adultery or desertion, as codes are drawn.

libel for adultery is more doubtful, and in the English ecclesiastical courts prior to the Divorce Statute the rule appears to have become established that it could not of itself.[98] It is also the general rule in this country [99] that an action of adultery will not be defeated by a charge of cruelty. So a man may maintain a divorce for his wife's adultery although he had previously maliciously turned her out of doors. There is no reason why a woman who has been abandoned by her husband shall be privileged to commit adultery any more than if she were a widow or a single woman. There are some old cases which sustain the contrary view on the ground that the wife having no property might be forced and probably would be to form a new connection in order to obtain a support, but now, under modern statutes, she can obtain a separate support, and her property is preserved to her although married, so that the reason for the ancient rule no longer holds.[1]

Desertion not continued for a sufficient length of time to constitute a ground for divorce prior to the act of adultery will not be a defence to an action of divorce for adultery,[2] the offences not being of the same gravity.[3]

Condemnation of an infamous crime, although a cause of divorce,

98. Harris v. Harris, 2 Hag. Ec. 376.

99. Bancroft v. Bancroft, 85 A. 561; Stiles v. Stiles, 167 Ill. 576, 47 N. E. 867; Zimmerman v. Zimmerman, 242 Ill. 552, 90 N. E. 192.

Plaintiff was entitled to a divorce from defendant for his habitual drunkenness and gross physical cruelty to her, notwithstanding misconduct on her part, where it was provoked by him. Garrett v. Garrett, 96 N. E. 882, 252 Ill. 318, reversing judgment 160 Ill. App. 321; Hughes v. Hughes, 133 Ill. App. 654; *contra*, Willett v. Willett (Mo. App.), 196 S. W. 1058; Wilson v. Wilson, 89 Neb. 749, 132 N. W. 401.

1. Ellett v. Ellett, 157 N. C. 161, 72 S. E. 861, 39 L. R. A. (N. S.) 1135; Moss v. Moss, 24 N. C. 55; Tew v. Tew, 80 N. C. 316, 30 Am. R. 84.

2. Walker v. Walker, 172 Mass. 82, 51 N. E. 455.

3. Van Horn v. Arantes, 116 La. 130, 40 So. 592; Ellett v. Ellett, 157 N. C. 161, 72 S. E. 861; Mattison v. Mattison, 113 N. Y. S. 1024, 60 Misc. 573; Fitzpatrick v. Fitzpatrick, 47 N. Y. S. 737, 21 Misc. 378 (where desertion caused by plaintiff's own misconduct); McCannon v. McCannon, 73 Vt. 147, 50 A. 799.

may not be a defence to continuing adultery by the wife, as the latter offence is more urgent.[4] And where parties separate by mutual consent and live apart by agreement, this living apart is not a defence by one of the parties to a petition for divorce for adultery.[5]

§ 1729. Whether a Condoned Offence Can Be Set Up in Recrimination.

This is found a difficult issue to decide in practice, courts having differed in their views according to the circumstances presented, and local statutes now controlling the subject to some extent.[6] On principle, however, the party forgiven should stand as an innocent party in court if constant to the condition of forgiveness, so that the condoning party could no more use the guilt for recrimination than upon an original suit for divorce. Any other view, as Mr. Bishop has well suggested, would give to a condoning spouse the license of profligacy for the future, and some cases therefore hold that condonation by one of adultery does not give that spouse any license to offend in the same way,[7] and where the adultery has been condoned it cannot be set up in defence.[8] So impotence waived by long cohabitation cannot be set up as a defence.[9]

There is some authority that recrimination based on adultery is

4. Abshire v. Hanks, 119 La. 425, 44 So. 186.

5. Freeman v. Freeman (N. J.), 88 A. 1071, 49 L. R. A. (N. S.) 1042.

6. Against allowing recrimination in such form may be cited Anichini v. Anichini, 2 Curt. Ec. 210; Jones v. Jones, 3 C. E. Green, 33. Cases more inclined to permit such recrimination are Wood v. Wood, 2 Paige, 108; Goode v. Goode, 2 Swab. & T. 253; Beeby v. Beeby, 1 Hag. Ec. 789; Masten v. Masten, 15 N. H. 159.

7. Eames v. Eames, 133 Ill. App. 665.

Where a wife condones the adultery of her husband, he can be divorced from her for a similar offence subsequently committed by her. Talley v. Talley, 215 Pa. 281, 64 A. 523.

8. Wabeke v. Wabeke (Ia. 1904), 98 N. W. 559; Storms v. Storms, 71 N. J. Eq. 549, 64 A. 700; Talley v. Talley, 215 Pa. 281, 64 A. 523; Rogers v. Rogers, 81 Wash. 502, 142 P. 1150.

9. G—— v. G——, 67 N. J. Eq. 30, 56 A. 736.

not a defence where the adultery was condoned, but the English Court of Appeals has recently held that a wife cannot be granted a judicial separation where she has been guilty of adultery, although the husband's conduct conduced to hers and her adultery was connived at by him.[10] So it has been held in this country that the condoned offence may be set up in defence to an action for divorce for desertion caused by the condoned adultery.[11]

So where a wife brought suit for divorce, and then returned to live with the husband, who later brings action for divorce, the wife may set up her grounds for divorce as alleged in her action.[12]

10. Everett v. Everett, 121 L. T. R. 503.

11. Deisler v. Deisler, 69 N. Y. S. 326, 59 App. Div. 207.

12. Weber v. Weber, 195 Mo. App. 126, 189 S. W. 577.

CHAPTER XXVII.

DECREE.

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§ 1730. Jurisdiction Necessary.

The court must obtain jurisdiction of the subject-matter or of the person of the parties, and a decree granted without either is void,[13] although the record need not always show the jurisdictional facts.[14]

13. Hekking v. Pfaff (U. S. C. C. A. 1898), 82 F. 403, affd. (1898) 33 C. C. A. 328, 91 F. 60, 43 L. R. A. 618; Miller v. Miller, 37 Nev. 257, 142 P. 218; Sperry v. Sperry (Tex. Civ. App. 1907), 103 S. W. 419; *In re* Christensen's Estate, 17 Utah, 412, 53 P. 1003, 70 Am. St. R. 794, 41 L. R. A. 504; Anderson v. Anderson, 97 Wash. 202, 166 P. 60; Powell v. Powell, 66 Wash. 561, 119 P. 1119; Graham v. Graham, 149 Wis. 602, 136 N. W. 162. See Clark v. Clark, 191 Mass. 128, 77 N. E. 702 (decree valid where court makes reasonable efforts to reach defendant).

Prescription. A judgment of divorce absolutely void does not fall within the curative effect of prescription. Elmore v. Johnson, 121 La. 277, 46 So. 310.

A decree for alimony is a decree *in personam*, and is not binding unless the court had jurisdiction over the person against whom it is passed. McSherry v. McSherry, 113 Md. 395, 77 A. 653.

14. McNeil v. McNeil (U. S. C. C.

An entry of appearence, though obtained by fraud, will give the court colorable jurisdiction,[15] but a forged entry of appearance gives no jurisdiction.[16]

Where the record shows personal service on the defendant the decree is not void, but may be voidable,[17] but a decree of divorce based on a void marriage is void.[18]

Where an error in naming the parties is committed the court must be satisfied that it is purely clerical, and that the proper party was served.[19]

§ 1731. Decree Must Be Based on Hearing and Finding, and Not on Agreement or Default.

The interest of the public in divorce[20] results in some principles peculiar to this action. The public is interested that the marriage state be preserved as sacred and that no dissolution of a valid marriage take place except on cogent reasons, and therefore proof of the grounds for divorce can never be dispensed with.[21] The decree must be based on some finding,[22] and cannot be allowed merely on

Cal. 1897), 78 F. 834; Marshall v. Marshall, 88 Mo. App. 325 (notice need not be recited in decree); *contra*, Salzbrun v. Salzbrun, 81 Minn. 287, 83 N. W. 1088 (where one year's residence did not appear).

15. Maher v. Title Guarantee & Trust Co., 95 Ill. App. 365.

16. Brown v. Dann, 71 Kan. 733, 81 P. 471.

17. Swearingen v. Swearingen (Tex. Civ. App.), 193 S. W. 442.

18. Snell v. Snell, 191 Ill. App. 239.

19. Owens v. Owens (N. J. Ch. 1907), 66 A. 929.

Error in spelling the names of parties to divorce proceedings in the notice and petition is not sufficient to avoid a decree properly entered. Richardson v. King, 157 Ia. 287, 135 N. W. 640.

20. See *ante*, § 1478.

21. See further *ante*, § 1484.

22. Coleman v. Coleman, 23 Cal. App. 423, 138 P. 362; Lyons v. Lyons, 272 Ill. 329, 196 Ill. App. 73, 111 N. E. 977; Fricke v. Fricke, 124 Ill. App. 39; Randall v. Randall, 175 Ill. App. 392; Goldner v. Goldner, 63 N. Y. S. 431, 49 App. Div. 395; Boller v. Boller, 89 N. Y. S. 200, 96 App. Div. 163; Schlesinger v. Klinger, 98 N. Y. S. 545, 112 App. Div. 853; State v. Superior Court of Washington for Kitsap County, 46 Wash. 395, 90 P. 258.

consent of parties,[23] but may be entered after consent on proof.[24] Neither can divorce be allowed on the pleadings without hearing evidence,[25] or on a default,[26] but if defendant fails to appear the court must proceed to hear the case and require proof from the plaintiff.[27] The court may enter a decree after proof on default where the defendant fails to comply with an order for alimony *pendente lite* and presents no excuse for his failure.[28] Default cannot be entered until the time for appearance allowed by statute has passed.[29]

A decree against the plaintiff may be made although no answer is filed.[30]

§ 1732. Form of Decree.

The case having been duly heard upon the proofs submitted — since no bill of divorce should be granted *pro confesso,* and even jury trials are less a matter of common right than of statute or

23. De Heren v. De Heren, 6 Ariz. 270, 56 P. 871 (where defendant appears and consents that the decree may stand on conditions this is not void as made by consent); Spencer v. Spencer, 61 Fla. 777, 55 So. 71; Patrick v. Patrick, 30 Ky. Law Rep. 1364, 101 S. W. 328; Sebastian v. Rose, 135 Ky. 197, 122 S. W. 120; Robinson v. Robinson, 16 Mich. 79; Boyer v. Boyer, 114 N. Y. S. 15, 129 App. Div. 647.

24. Brick v. Brick, 65 Mich. 230, 31 N. W. 907, 33 N. W. 761.

25. Miller v. Miller, 65 Ore. 551, 131 P. 308.

26. Purvis v. Purvis, 153 N. Y. S. 269, 167 App. Div. 717.

27. Falley v. Falley, 163 Ala. 626, 50 So. 894; Kirkpatrick v. Kirkpatrick, 152 Cal. 316, 92 P. 853; Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020; Wakefield v. Wakefield, 16 Cal. App. 113, 116 P. 309; Geisseman v. Geisseman, 34 Colo. 481, 83 P. 635; State v. Wolfe, 58 So. 841; Hancock v. Hancock, 55 Fla. 680, 45 So. 1020, 15 L. R. A. (N. S.) 670; Kline v. Kline, 104 Ill. App. 274; Meyer v. Meyer, 60 Kan. 859, 57 P. 550; O'Brien v. D'Hemecourt, 118 La. 996, 43 So. 654; Bursha v. Lane, 105 La. 112, 29 So. 712; Grant v. Grant, 84 N. J. Eq. 81, 92 A. 791; Burch v. Burch, 102 N. Y. S. 305, 116 App. Div. 865.

28. Bennett v. Bennett, 16 Okla. 164, 83 P. 550, affd. (1908) 208 U. S. 505, 28 S. Ct. 356, 52 L. Ed. 590.

29. Mottschall v. Mottschall, 31 Colo. 260, 72 P. 1053; State v. Doyle, 107 Minn. 498, 120 N. W. 902.

30. Danforth v. Danforth (Nev.), 166 P. 927.

judicial permission, where the usual principle prevails, inasmuch as the court retains control and exercises full supervision of the proceedings from beginning to end — judgment,[31] if the plaintiff has maintained his or her cause, will be entered in that plaintiff's favor. Such a decree, following the local code, may be *nisi,* or in the nature of a divorce from bed and board, in which case the libellant continues subject to certain disabilities: he cannot marry again without leave of the court, or until the decree *nisi* is made absolute, or else a divorce from bond of matrimony follows in due time, and, upon due proceedings, the divorce from bed and board.[32]

A mere memorandum that divorce is ordered is not a final decree when made before the judgment day, as there should be a formal decree in divorce[33] entered on the court records.[34]

The omission from a decree of its date as required by law does not render it void.[35]

§ 1733. Extent of Relief.

The character of the decree rests in the sound discretion of the court, which is not governed by the prayer in the bill.[36]

31. Sparhawk v. Sparhawk, 120 Mass. 390; Rand v. Rand, 56 N. H. 421. The decree should follow the cause pleaded and the allegations of the bill. Livingston v. Hayes, 43 Mich. 129.

32. Norman v. Villars, L. R. 2 Ex. D. 359; Whiting v. Whiting, 114 Mass. 494. Remarriage under misapprehension before the decree was made absolute is sometimes regarded with indulgence. Wickham v. Wickham, 49 L. J. 70. But the reverse holds true of some decisions. Moors v. Moors, 121 Mass. 232. Marriage a second time on the faith of a void decree of divorce may prove likewise perilous. State v. Armington, 25 Minn. 29.

33. Vigno v. Vigno (N. H.), 106 A. 285.

34. Robinson v. Robinson, 166 Ky. 485, 179 S. W. 436.

35. Phillips v. Phillips, 69 Kan. 324, 76 P. 842.

36. Kane v. Kane, 161 Ill. App. 385; Coon v. Coon, 163 Mich. 644, 129 N. W. 12, 17 Det. Leg. N. 1006; Morey v. Morey, 117 Mich. 440, 75 N. W. 934, 5 Det. Leg. N. 279; Salzbrun v. Salzbrun, 81 Minn. 287, 83 N. W. 1088; McKnight v. McKnight, 5 Neb. (unof.) 260, 98 N. W. 62; G—— v. G——, 67 N. J. Eq. 30, 56 A. 736; Fisk v. Fisk, 24 Utah, 333, 67 P. 1064; Mitchell v. Mitchell, 39 Wash. 431, 81 P. 913; Lessig v. Lessig, 136 Wis. 403, 117 N. W. 792.

Under some statutes the court may in an application for absolute divorce grant a divorce from bed and board,[37] or a decree for absolute divorce may be rendered after a decree for separation,[38] but the court has no jurisdiction to settle the claims of the wife against the husband for her separate property in a petition for divorce.[39]

It is not an essential part of a decree in divorce that it disposes of the custody of the children.[40]

§ 1734. Limited Divorce.

A decree for limited divorce or separation usually may be granted where the facts require even though absolute divorce is refused,[41] but only where such relief is asked for,[42] and not where both parties are guilty and neither is entitled to a divorce.[43]

37. Crews v. Crews, 68 Ark. 158, 56 S. W. 778; Orton v. Orton, 159 Mich. 236, 123 N. W. 1103, 16 Det. Leg. N. 922.

38. Donato v. Frillot, 116 La. 119, 40 So. 634.

39. Letts v. Letts, 73 Mich. 138, 41 N. W. 99; Sutton v. Sutton, 78 Ore. 9, 152 P. 271.

As to division of property on divorce, see *post*.

40. Arndt v. Arndt, 177 Mo. App. 420, 163 S. W. 282.

As to custody of children on divorce, see *post*.

41. Gray v. Gray (Ark. 1906), 98 S. W. 975; Sweasey v. Sweasey, 126 Cal. 123, 58 P. 456; Yates v. Yates, 36 App. D. C. 518; Pope v. Pope, 161 Ky. 104, 170 S. W. 504; Ramsey v. Ramsey, 162 Ky. 741, 172 S. W. 1082; Bottom v. Bottom, 143 Ky. 666, 137 S. W. 198; Phillips v. Phillips, 173 Ky. 608, 191 S. W. 482; Lumbiel v. Lumbiel, 113 Ky. 841, 69 S. W. 708, 24 Ky. Law Rep. 590; Bursha v. Lane, 105 La. 112, 29 So. 712; De Ferrari v. De Ferrari, 220 Mass. 38, 107 N. E. 404; Heinze v. Heinze, 107 Minn. 43, 563, 119 N. W. 489; Pick v. Pick, 156 N. W. 769; Freeman v. Belfer, 173 N. C. 581, 92 S. E. 486; Costell v. Costell, 69 N. J. Eq. 218, 60 A. 49; O'Neill v. O'Neill, 163 N. Y. S. 250 (time of separation ordered may be limited); Pollitzer v. Pollitzer, 165 N. Y. S. 953, 178 App. Div. 744; Crawford v. Crawford, 64 Pa. Super. Ct. 30; Crawford v. Crawford, 54 Pa. Super. Ct. 304; Voss v. Voss, 157 Wis. 430, 147 N. W. 634 (maintenance of wife and children ordered); Graham v. Graham, 149 Wis. 602, 136 N. W. 162.

The principal object of a decree of separation because of the husband's extreme cruelty is the reasonable protection of the wife against future probable acts of cruelty. Pittis v. Pittis, 82 N. J. Eq. 635, 89 A. 749.

42. Wheeler v. Wheeler, 101 Md. 427, 61 A. 216.

43. Elliott v. Elliott, 34 Colo. 298, 83 P. 630.

§ 1735. Absolute Divorce.

The court may in a proper case grant an absolute divorce on proper pleadings and evidence,[44] even although only a limited divorce is asked for in the petition,[45] but not based on a foreign judgment of separation.[46]

§ 1736. Delay Before Final Decree.

The legislature may require a delay after a finding for a divorce before the entry of a final decree,[47] but a judgment for divorce is not void merely because the case was prematurely submitted for final judgment.[48]

§ 1737. Reconciliation Before Final Decree.

Where a reconciliation takes place after an interlocutory decree, and before the time fixed by statute for entry of a final decree, the court can then enter no final decree. The very purpose of a delay in entry of a final decree is to give an opportunity for reconciliation.[49]

44. Howlett v. Howlett, 24 Ky. Law Rap. 974, 70 S. W. 404; Ellerbusch v. Kogel, 108 La. 51, 32 So. 191 (after separation for two years); McCue v. McCue, 191 Mich. 1, 157 N. W. 369; Coon v. Coon, 163 Mich. 644, 129 N. W. 12, 17 Det. Leg. N. 1006; Sullivan v. Sullivan, 112 Mich. 674, 71 N. W. 487, 4 Det. Leg. N. 175 (though only separation is asked for); Burlage v. Burlage, 65 Mich. 624, 32 N. W. 866; Chapman v. Chapman, 70 W. Va. 522, 74 S. E. 661; Dixon v. Dixon, 73 W. Va. 7, 79 S. E. 1016; Yates v. Yates, 157 Wis. 219, 147 N. W. 60 (is final judgment).

45. Cole v. Cole (Mich.), 160 N. W. 418; Shequin v. Shequin, 152 N. W. 823.

46. Zavaglia v. Notarbartolo, 137 La. 722, 69 So. 152.

47. Grannis v. Superior Ct. of City and County of San Francisco, 146 Cal. 245, 79 P. 891, 106 Am. St. R. 23; Claudius v. Melvin, 146 Cal. 257, 79 P. 897; Smith v. Superior Court of City and County of San Francisco, 147 Cal. 336, 82 P. 79; Gibson v. Gibson, 81 N. Y. S. 343, 40 Misc. 103, 13 N. Y. Ann. Cas. 25; Rothstein v. Rothstein, 81 N. Y. S. 342, 40 Misc. R. 101, 13 N. Y. Ann. Cas. 21; Howatt v. Howatt, 142 N. Y. S. 908, 158 App. Div. 28 (final decree entered although delay in applying for it).

48. Carr's Adm'r v. Carr, 92 Ky. 552, 18 S. W. 453, 36 Am. St. R. 614, 13 Ky. Law Rep. 756.

49. Olson v. Superior Court, 175 Cal. 250, 165 P. 706, 1 A. L. R. 1589.

§ 1738. Decree Nisi.

Some check being proper upon decrees so momentous as those of divorce, we find in the English system, and in certain States, the principle of decrees *nisi,* which give delay for remedying error or affording to the parties a final opportunity for reconciliation. A divorce *nisi* does not put an end to the marriage relation, but is in the nature of a divorce from bed and board.[50]

A decree *nisi* is an interlocutory decree in divorce which may become final unless good cause is shown to the contrary within a certain specified time,[51] but a defendant cannot delay making his defence until the decree *nisi* is entered and then present it.[52] A decree *nisi* alone does not affect the status of the parties,[53] and has no effect to avoid an order for support.[54]

A decree which fails to state that it is not operative for six months is still good as a decree *nisi,* as the provisions of the statute are read into it.[55]

§ 1739. Right of Defendant to Insist on Final Decree for Plaintiff.

A defendant cannot insist that the plaintiff should have final judgment entered after a decree *nisi,* but the defendant may insist that the plaintiff either take out final judgment or have his action vacated.[56]

§ 1740. Final Decree Terminates Jurisdiction of Court.

Save for the enforcement or correction of such judgment,[57] the

50. Fox v. Davis, 113 Mass. 255; Sparhawk v. Sparhawk, 116 Mass. 315; Garnett v. Garnett, 114 Mass. 347.

51. Brown v. Brown, 207 Mass. 254, 93 N. E. 607; Grant v. Grant, 84 N. J. Eq. 81, 92 A. 791.

52. Gabriel v. Gabriel, 86 N. J. Ch. 6, 97 A. 495.

53. Adams v. Adams, 106 N. Y. S. 1064, 57 Misc. 150.

54. *In re* Jones (Del. Super.), 102 A. 81.

55. Calvert v. Calvert (Utah), 176 P. 731.

56. Mattson v. Mattson, 85 N. J. Eq. 454, 97 A. 40; Bishop v. Bishop, 144 N. Y. S. 143, 82 Misc. 676.

57. Holbrook v. Holbrook, 114 Mass. 568; Nichols v. Nichols, 25 N. J. Eq. 60; Lord v. Lord, 66 Me. 265.

entry of a final decree in proceedings for divorce *a vinculo* will terminate the jurisdiction of the court over the subject-matter of the action, and over the parties in respect to all matters involved in it.[58]

§ 1741. Setting Aside Decree.

Divorce proceedings are flexible, to a large decree interlocutory, and further subject in higher courts to appeal, review, and orders for new trial or to vacate. Since, however, the decree which is finally entered for absolute divorce cannot be set aside without restoring marital relations to the same condition as before, to the distress, perhaps, of parties remarried and of their offspring,[59] such a decree ought not to be readily vacated, upon request, long after it has been entered, nor ever except for pressing cause, as in fraud, imposition, or an utter want of jurisdiction.[60]

The decree will be set aside only on offer of a proper defence,[61] and not because of irregularities where there was a trial and the defendant took part in the proceedings,[62] and not where the defendant acted on erroneous advice, as this is a mistake of law.[63]

The decree will be set aside only where it appears that the condition of the parties has not changed since the entry of the judgment,[64] and the court will hesitate to set aside a decree for divorce after the death or remarriage of one of the parties.[65] An inter-

58. Kamp v. Kamp, 59 N. Y. 212.

59. Comstock v. Adams, 23 Kan. 513; Holmes v. Holmes, 63 Me. 420; Lawrence v. Lawrence, 73 Ill. 577.

60. See Adams v. Adams, 51 N. H. 388, and cases cited.

61. Paynton v. Paynton (Mich.), 160 N. W. 837; Jones v. Jones, 37 Mont. 155, 94 P. 1056; Maguire v. Maguire, 78 N. Y. S. 312, 75 App. Div. 534; Peterson v. Peterson, 15 S. D. 462, 90 N. W. 136; Wade v. Wade (Tex. Civ. App.), 180 S. W. 643.

62. De Hereu v. De Hereu, 6 Ariz. 270, 56 P. 871; Day v. Nottingham, 160 Ind. 408, 66 N. E. 998.

63. De Hereu v. De Hereu, 6 Ariz. 270, 56 P. 871.

64. Summers v. Summers, 146 Ky. 653, 143 S. W. 27.

65. Day v. Nottingham, 160 Ind. 408, 66 N. E. 998.

locutory decree will not be set aside before the expiration of the time for entry of final decree.[66]

In some States a decree for divorce, like other decrees, does not become final until the end of the term when the parties are entitled to judgment if the litigation is at an end, or until a special order is made for judgment on a specified date during term time. Under this practice, after a decree has been entered, but before the end of the term, the court may open the decree on a motion for rehearing.[67]

Where proceedings for appeal are available they must be used,[68] and a decree cannot be vacated after expiration of the time set by statute for making application.[69] The plaintiff is estopped to complain of an irregularity in the decree in his favor.[70]

A judgment will be set aside on account of newly discovered evidence only where it appears that the evidence could not have been discovered before by due diligence.[71]

§ 1742. Setting Aside Decree Entered Without Jurisdiction or on Default.

The court of the State which renders a decree of divorce, having no jurisdiction of the subject-matter or of the parties, may, of its own accord, annul and set aside that decree in a proper proceeding, begun in due season by the complaining party; and this, notwithstanding the party procuring the divorce has remarried and become a parent.[72]

On the whole, the latest American cases tend to break up the

66. Barron v. Barron, 8 Cal. App. xiii., 96 P. 273.

67. Carpenter v. Carpenter (N. H.), 101 A. 628, L. R. A. 1917F, 974.

68. Lewis v. Lewis, 138 Ia. 593, 116 N. W. 698.

69. Hale v. Kinnaird (Ala.), 76 So. 954; Andreen v. Andreen, 15 Cal. App. 728, 115 P. 761; Bettencourt v. Superior Court of Kings County, 32 Cal. App. 607, 163 P. 682; Sudbury v. Sudbury (Ia.), 162 N. W. 209 (though fraud was not discovered within the period).

70. Johnson v. Johnson, 182 Ala. 376, 62 So. 706.

71. Eacutt v. Eacutt, 197 Ill. App. 334.

72. Willman v. Willman, 57 Ind. 500; Whitcomb v. Whitcomb, 46 Ia. 437.

vicious practice prevalent, not many years ago, in various parts of this country, of procuring surreptitious decrees of divorce for extra-territorial purposes. Persons remarrying on the faith of such decrees have been subjected, in the State of actual domicile, to prosecution for bigamy.[73] Hence a decree may be set aside where no notice has been given to the defendant or a judgment entered on default where justice requires it.[74]

A decree is properly set aside on evidence that it was entered through inadvertance or neglect of defendant's counsel,[75] or where it appears that the statute has not been complied with.[76]

73. People v. Dawell, 25 Mich. 247; People v. Baker, 76 N. Y. 78. As to the validity of a foreign decree for alimony, see Prosser v. Warner, 47 Vt. 667. See also *post*, § 1981 *et seq.*

74. Lockwood v. Lockwood (Ariz.), 169 P. 501; Suttman v. Superior Court in and for the City and County of San Francisco (Cal.), 162 P. 1032; Medina v. Medina, 22 Colo. 146, 43 P. 1001; Tollefson v. Tollefson, 137 Ia. 151, 114 N. W. 631; Patterson v. Patterson, 57 Kan. 275, 46 P. 304; Hughes v. Hughes, 162 Ky. 505, 172 S. W. 960; Hekkema v. Kalamazoo Circuit Judge, 151 N. W. 629; Hews v. Hews, 145 Mich. 247, 108 N. W. 694, 13 Det. Leg. N. 482; Bunderman v. Bunderman, 117 Minn. 366, 135 N. W. 998; Hudson v. Hudson, 176 Mo. App. 69, 162 S. W. 1062; Grant v. Grant, 84 N. J. Eq. 81, 92 A. 791; Hamilton v. Hamilton, 51 N. Y. S. 365, 29 App. Div. 331; Henderson v. Henderson, 82 N. Y. S. 444, 83 App. Div. 449; Mott v. Mott, 119 N. Y. S. 483, 134 App. Div. 569 (where defendant at time of trial); Jewell v. Jewell, 89 N. Y. S. 166, 96 App. Div. 633; Casto v. Casto, 30 Ohio Cir. Ct. R. 96; Hague v. Hague, 79 Ore. 646, 156 P. 277; Taylor v. Taylor, 61 Ore. 257, 121 P. 431, rehearing denied *Id.* 964; Taylor v. Taylor, 61 Ore. 257, 121 P. 964, denying rehearing *Id.* 431; Willard v. Willard, 98 Va. 465, 36 S. E. 518; Lessig v. Lessig, 136 Wis. 403, 117 N. W. 792. See Hamilton v. Hamilton, 21 Idaho, 672, 123 P. 630. See Metler v. Metler, 32 Wash. 494, 73 P. 535.

A default judgment of divorce will be set aside on slight showing. Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020.

A default judgment in a divorce action, absolutely void for want of jurisdiction, may be attacked by the defendant at any time, either by direct or collateral proceeding. Belknap v. Belknap, 154 Ia. 213, 134 N. W. 734.

75. Jones v. Jones, 37 Mont. 155, 94 P. 1056; Gans v. Gans, 76 A. 234. See Erickson v. Erickson, 147 N. W. 737.

76. McWilliams v. Lenawee Circuit Judge, 142 Mich. 226, 105 N. W. 611, 12 Det. Leg. N. 662 (where affidavit that is no collusion is lacking); Miller v. Miller, 37 Nev. 257, 142 P. 218.

§ 1743. Setting Aside Decree for Fraud.

A decree may be set aside where a fraud has been committed.[77] The court may open a divorce decree and ascertain if it was procured by perjured testimony without retrying the whole case.[78]

Where a proceeding is brought to annul and make void a divorce decree the petitioner need not allege that she has a meritorious defence or that she submits herself to the jurisdiction of the court for new proceedings, where the original divorce was obtained by fraud. Such a rule would permit a party to take advantage of his own wrong, since he could compel a party to submit to the jurisdiction of the court when jurisdiction could be obtained in no other way.

Where a judgment is obtained by constructive service and then proceedings are taken to open up the judgment for the purpose of making a defence to the original action, the defendant must then submit to the jurisdiction of the court and must set up a good defence in the form of an affidavit or answer.[79] And fraud in procuring such divorce may consist in taking up a fictitious residence for the purpose of giving jurisdiction, concealing the commencement of the suit from the defendant, and falsifying testimony.[80]

The court has the power to vacate a decree of divorce obtained by fraud on application seasonably made. Such a case is disclosed where the husband pretends that he will commit suicide if the wife does not agree to the divorce, and he thus persuades her to accept a lawyer he obtains for her and absents herself from the

77. Vanness v. Vanness, 128 Ark. 543, 194 S. W. 498; Womack v. Womack, 73 Ark. 281, 86 S. W. 937, motion to modify opinion denied 73 Ark. 281, 83 S. W. 1136 (where husband promises wife not to prosecute pending suit); Bell v. Bell, 97 Kan. 616, 156 P. 778; Van Slyke v. Van Slyke, 152 N. W. 921; Jones v. Jones, 82 N. J. Eq. 558, 89 A. 29; Helmes v. Helmes, 52 N. Y. S. 734, 24 Misc. 125; Evans v. Evans, 60 Ore. 195, 118 P. 177 (false statement of defendant's residence); Elmgren v. Elmgren, 25 R. I. 177, 55 A. 322. See Morton v. Morton, 117 Cal. 443, 49 P. 557.

78. Carpenter v. Carpenter (N. H.), 101 A. 628, L. R. A. 1917F, 974.

79. Atkinson v. Atkinson (Utah), 134 P. 595, 47 L. R. A. (N. S.) 499.

80. Whitcomb v. Whitcomb, 46 Ia. 437.

court when the case is called. This is in effect a divorce by default, although an appearance and answer were filed.[81]

Where the wife claims that a decree of divorce against her in another State where the parties formerly lived was obtained by fraud, she may testify concerning the fraud in a proceeding to secure possession of her minor child. Ordinarily it is not permissible for a party to attack a judgment for fraud in a collateral proceeding, as the party has his proper remedy by action to annul the judgment. But marriage being a status, and both parties being now residents of the State where the proceedings for custody are brought, the courts of the other State have no jurisdiction to fix the status of the child by amendment of the divorce decree, and therefore this will be allowed in the State where the parties now live.[82]

§ 1744. Setting Aside Decree; Collusion.

One who has obtained a decree of divorce cannot by direct petition have it vacated on the ground that it was obtained by a collusive arrangement, especially where there is no allegation that the attorneys in the case or the court failed to do their duty.[83] And as a general rule courts of equity will not interfere to relieve a party to an action from a judgment which has been procured through a collusive agreement between the parties to the action, to the effect that either of said parties shall commence the action and obtain by the connivance or consent of the other a judgment to which he would not otherwise be entitled. Hence equity will not set aside a judgment obtained in a divorce case where the plaintiff agreed to consent to the divorce and not contest the same, although the defendant did not carry out his part of the bargain by making certain provisions regarding the custody of the two children. Courts of equity will not interfere with judgments in divorce pro-

81. Graham v. Graham, 54 Wash. 70, 102 P. 891, L. R. A. 1917B, 405.

82. Milner v. Gatlin, 143 Ga. 816, 85 S. E. 1045, L. R. A. 1916B, 977.

83. Robinson v. Robinson (Wash.), 138 P. 288, 51 L. R. A. (N. S.) 534.

ceedings obtained solely through the collusive connivance of the parties to the proceeding.[84]

§ 1745. Setting Aside Decree; Laches.

A decree will not be vacated where the defendant was negligent in protecting herself after hearing of the pendency of the proceedings,[85] and not after knowledge and acquiescence by the defendant for a long period.[86]

When a divorce is obtained by fraud relief must be asked within a reasonable time after knowledge of the fraud or of facts from which a prudent person would proceed to ascertain the true condition of affairs. So where the wife, claiming that a divorce against her was obtained by fraud, waits fourteen years after knowledge of the divorce, and then only acts after the death of the husband, the court will decline to act. Where the court has jurisdiction and personal service is had the decree cannot be treated as a nullity, but it is at most voidable. The fact that the husband is now dead and cannot defend himself against the charges made is another reason for taking no action.[87]

84. Bancroft v. Bancroft (Cal.), 173 P. 579, L. R. A. 1918F.

85. Darwin v. Darwin, 27 Idaho, 303, 149 P. 467; Foxwell v. Foxwell, 122 Md. 263, 89 A. 494; Field v. Field, 67 Pa. Super. Ct. 355; McDonald v. McDonald, 34 Wash. 293, 75 P. 865.

86. Buffington v. Carty, 195 Mo. 490, 93 S. W. 779.

87. McElrath v. Littell, 120 Minn. 380, 139 N. W. 708, 44 L. R. A. (N. S.) 505.

CHAPTER XXVIII.

COSTS.

SECTION 1746. Costs in General.
1747. Items of Costs Allowed.
1748. Costs on Appeal.

§ 1746. Costs in General.[88]

A decree awarding a divorce to the plaintiff is sufficient to sustain the part of the decree awarding costs,[89] and the wife will nearly always be allowed costs if she prevails in a divorce suit,[90] and costs may be allowed against the co-respondent who fails in his defence.[91]

The court usually has a large discretion as to costs in divorce cases,[92] and costs not being a matter of right on dismissal of a petition by the wife, both parties may be left to bear their own costs,[93] while the costs may be taxed against the husband even though he is successful where the wife is without means.[94]

Costs cannot be awarded against a defendant who is not served and does not appear.[95]

88. Attorney's fees as costs, see *post*, § 1777 *et seq.*

89. Musselman v. Musselman, 140 Cal. 197, 73 P. 824.

90. Bursler v. Bursler, 22 Mass. (5 Pick.) 427; Burrows v. Purple, 107 Mass. 428; Stevens v. Stevens, 42 Mass. (1 Metc.) 279; Folkenberg v. Folkenberg, 58 Ore. 267, 114 P. 99.

91. Duke v. Duke, 72 N. J. Eq. 515, 73 A. 837; (Err. & App. 1907) *Id.*, 72 N. J. Eq. 941, 942, 73 A. 840; Clark v. Clark, 78 N. J. Eq. 304, 81 A. 1126; Billings v. Billings, 76 N. Y. S. 628, 11 N. Y. Ann. Cas. 73. See Mehlenbacker v. Mehlenbacker, 136 N. Y. S. 210, 77 Misc. 343 (costs to co-respondent).

92. Lyons v. Lyons, 272 Ill. 329, 196 Ill. App. 73, 111 N. E. 977.

93. Cross v. Cross, 55 Mich. 280, 21 N. W. 309.

94. Acker v. Acker, 22 App. D. C. 353; Whetstone v. Whetstone, 169 Ill. App. 171; Hedrick v. Hedrick, 28 Ind. 291; Wills v. Wills, 168 Ky. 35, 181 S. W. 619; Elliott v. Elliott, 138 Ky. 309, 127 S. W. 478; Fullen v. Fullen, 21 N. M. 212, 153 P. 294, 159 P. 952.

95. Edwards v. Edson, 104 N. Y. S. 292, 119 App. Div. 684.

§ 1747. Items of Costs Allowed.

Costs may be limited to taxable costs,[96] or they may include a reasonable attorney's fee,[97] and expenses incurred before a commissioner,[98] and the fee of a master appointed to hear the case.[99] Interest will not be awarded on costs allowed in the lower court.[1]

§ 1748. Costs on Appeal.

Where the wife appeals in good faith she may be allowed the costs of her appeal though unsuccessful,[2] and costs on appeal may be awarded against the husband even though he is successful in appealing.[3]

In Kentucky, however, it is held that the statute allowing costs to the wife does not apply to her costs on appeal from a decree of divorce against her on the ground that she is no longer a wife.[4]

Where an appeal is taken counsel fees will properly be allowed on final decree,[5] but where the losing party has already been put to great expense all costs on the appeal may be withheld.[6]

96. Sparrowhawk v. Sparrowhawk (N. Y. Sup. 1877), 11 Hun, 528; Lonsdale v. Lonsdale, 58 N. Y. S. 532, 41 App. Div. 224. See Marshall v. Marshall, 124 Md. 259, 92 A. 531 (as to costs of carbon copies of evidence).

97. Main v. Main, 150 N. W. 590.

98. Hiecke v. Hiecke, 163 Wis. 171, 157 N. W. 747.

99. Stewart v. Stewart, 65 Pa. Super. Ct. 593.

1. Huelmantel v. Huelmantel, 124 Cal. 583, 57 P. 582.

2. Cargnani v. Cargnani, 16 Cal. App. 96, 116 P. 306; Barger v. Barger, 151 Ky. 234, 151 S. W. 406 (on death of husband costs ordered paid from his estate); Reichert v. Reichert, 124 Mich. 694, 83 N. W. 1008, 7 Det. Leg. N. 389; Nichols v. Nichols, 163 Mich. 107, 127 N. W. 1042, 17 Det. Leg. N. 791; *contra*, Huelmantel v. Huelmantel, 124 Cal. 583, 57 P. 582. See Roby v. Roby, 10 Idaho, 139, 77 P. 213.

3. Corney v. Corney, 97 Ark. 117, 133 S. W. 813; Wills v. Wills, 168 Ky. 35, 181 S. W. 619.

4. Elliott v. Elliott, 138 Ky. 3261, 127 S. W. 1008.

5. Belding v. Belding (Ia. 1904), 97 N. W. 1112. See Van Driele v. Van Driele, 58 Mich. 273, 25 N. W. 188.

6. Page v. Page, 51 Mich. 88, 16 N. W. 245; German v. German, 57 Mich. 256, 23 N. W. 802.

CHAPTER XXIX.

NATURE OF ALIMONY.

SECTION 1749. Alimony Defined; Temporary and Permanent.
1750. Nature of Alimony.
1751. Nature of Proceedings for Alimony.
1752. Effect of Alimony Making Wife a Dependent.
1753. Lien for.
1754. Whether Subject to Attachment or Execution.
1755. Homestead Not Subject to Alimony.
1756. Alimony Not Barred by Bankruptcy.

§ 1749. Alimony Defined; Temporary and Permanent.

Alimony may be defined as the allowance which a husband, by order of the matrimonial court having due jurisdiction, must pay to his wife living separate from him for her maintenance. Alimony is of two kinds: alimony temporary or *pendente lite,* whose object being to provide for the needs of a wife during the pendency of a matrimonial suit, its allowance is granted quite readily, upon petition, whether the husband were innocent or guilty, so long as the party seeking it is really his wife; and at the termination of the suit permanent alimony, which is now awarded, at judicial discretion, under statutes enlarging the old law,[7] on the theory that the divorced wife should have a regular maintenance from her husband's estate according to her own deserts, his means, and the wrong her late husband has done her. If, however, he has done her no wrong, but she herself is the offender, the wife has no right to permanent alimony at all,[8] for the husband's grievance is

7. Agreeably to the old English ecclesiastical practice of decreeing only divorce from bed and board, no alimony could be awarded upon divorce from bond of matrimony more than upon sentence of nullity.

8. Palmer v. Palmer, 1 Paige, 276; 3 Bl. Com. 94; sections *post.* In some States even a guilty wife may frequently, under the divorce code, procure permanent alimony. Deenis v. Deenis, 79 Ill. 74; Dailey v. Dailey, Wright, 514. But as matter of justice, this ought to be regulated by the husband's own sense of justice or pity.

enough for him to bear without so burdensome an imposition upon his property apart from his own consent.

§ 1750. Nature of Alimony.

Alimony is a doctrine founded in the common-law obligation of the husband to support his wife, but is affected in modern times by equity and statutory changes with regard to coverture disabilities.[9]

Alimony is not founded on contract, but arises out of the relation of marriage and the husband's duty of support,[10] and it is therefore not improper in an argument on an award for alimony for counsel to refer to the duty of the husband to support the wife.[11] Alimony cannot be allowed where there is no valid marriage,[12] and the earnings or other personal estate of the husband are subject to its payment.[13]

§ 1751. Nature of Proceedings for Alimony.

Alimony is commonly incidental to the divorce suit and a separate proceeding will not lie,[14] but the power of the court to award it is in no way dependent on the divorce decree itself,[15] but

9. See *supra*, § 83 *et seq.*

10. Hazard v. Hazard, 197 Ill. App. 612; Walter v. Walter, 189 Ill. App. 345; Toncray v. Toncray, 123 Tenn. 476, 131 S. W. 977.

11. Fowler v. Fowler (Okla.), 161 P. 227, L. R. A. 1917C, 89.

12. Morgan v. Morgan (Ga.), 97 S. E. 675 (where parties under age); Becker v. Becker, 153 Wis. 226, 140 N. W. 1082.

13. Wilford v. Wilford, 94 A. 685.

14. Conway v. United States, 149 F. 261; People v. District Court of Denver (Colo.), 182 P. 5; Eickhoff v. Eickhoff, 14 Colo. App. 127, 59 P. 411; Stanbrough v. Stanbrough, 27 Ind. App. 25, 60 N. E. 714; Campbell v. Campbell, 115 Ky. 656, 74 S. W. 670, 25 Ky. Law Rep. 53; Landreaux v. Landreaux, 114 La. 528, 38 So. 442 (where wife brings cross-action); Weidman v. Weidman, 57 Ohio St. 101, 48 N. E. 506; Burns v. Burns (Tex. Civ. App. 1910), 126 S. W. 333; Brenger v. Brenger, 142 Wis. 26, 125 N. W. 109. See Hughes v. Kepley, 60 Kan. 859, 58 P. 556; Cizek v. Cizek, 69 Neb. 797, 99 N. W. 28.

15. Simpson *v.* Simpson, 21 Cal. App. 150, 131 P. 99; State *ex rel.* Gereke v. Seddon, 93 Mo. 520, 6 S. W. 342; Steele v. Steele, 85 Mo. App. 224; Toncray v. Toncray, 123

in some States an independent action for alimony may be sustained.[16]

The court may in some States award alimony or a settlement out of the defendant's property in divorce in its general chancery powers.[17]

§ 1752. Effect of Alimony Making Wife a Dependent.

Where the wife is granted alimony in a fixed sum which is decreed shall be a lien on his property she is a "dependent" of his within the terms of the insurance statutes providing that only "dependents" shall be allowed to share in the benefits of policies.[18]

§ 1753. Lien for.

Under a statute giving a lien for alimony the lien dates from the first decree awarding temporary alimony, and includes not only alimony due, but future alimony to become due, and is a lien on all the real estate of the husband.[19]

§ 1754. Whether Subject to Attachment or Execution.

Alimony is an allowance for support, which is made upon considerations of equity and public policy. It is not property of the wife recoverable as debt, damages or penalty. It is based upon the obligation, growing out of the marriage relation, that the husband must support his wife — an obligation which continues even after a legal separation without her fault. Being thus founded upon public policy, and created in equity, it cannot be diverted

Tenn. 476, 131 S. W. 977; Huff v. Huff, 73 W. Va. 330, 80 S. E. 846.

16. Horton v. Horton, 75 Ark. 22, 86 S. W. 824; Williamson v. Williamson (Ky.), 209 S. W. 503 (although no right to divorce); Outlaw v. Outlaw, 118 Md. 498, 84 A. 383 (in equity).

17. Miller v. Miller, 210 Ill. App. 67.

In Alabama alimony is of several classes, first, alimony *pendente lite;* second, allowance in equity after separation when no divorce is granted; third, allowance to wife on decree of divorce. Ortman v. Ortman (Ala.), 82 So. 417.

18. Johnson v. Grand Lodge A. O. U. W., 91 Kan. 314, 137 P. 1190, 50 L. R. A. (N. S.) 461.

19. Isaacs v. Isaacs (Va.), 86 S. E. 105, L. R. A. 1916B, 648.

from the purpose of support without public injury; and therefore the courts which create the fund should see that it is not subjected to the rapacity of pre-existing creditors, who necessarily became such on the faith and credit of other funds. Such creditors have no claim on the support provided by the husband during the existence of the marriage relation.[20]

In a recent case the court remarks that it seems to be conceded that alimony cannot be applied to pre-existing debts except in cases where the alimony has come into the wife's possession, but the court goes on to remark that "at no time and under no circumstances can alimony be lawfully subjected to the payment of a pre-existing debt." In that case the alimony had been paid to the wife's attorney, and it is held that he cannot be ordered to pay it over to a pre-existing creditor.[21]

Alimony due a judgment debtor is not subject to execution, especially where partly for the benefit of the child.[22]

§ 1755. Homestead Not Subject to Alimony.

There are many cases showing the general tendency of the courts to regard alimony as not subject to the exemption statutes [23] with the exception that homestead exemption is usually regarded as sacred even as against a claim for alimony.[24]

The remarriage of the husband against whom a divorce has been granted will not affect the situation, as he cannot thus claim

20. Kingman v. Carter, 8 Kan. App. 46, 54 P. 13; Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712; Fickel v. Granger (Ohio St.), 93 N. E. 527, 32 L. R. A. (N. S.) 270.

21. Fickel v. Granger (Ohio St.), 93 N. E. 527, 32 L. R. A. (N. S.) 270.

22. Van Valkenburgh v. Bishop, 164 N. Y. S. 86.

23. Tully v. Tully, 159 Mass. 91, 34 N. E. 79 (federal pension); Zwingmann v. Zwingmann, 134 N. Y. Supp. 1077, 150 App. Div. 358 (pension).

24. Silvia, *ex parte*, 123 Cal. 293, 55 P. 988, 69 Am. St. R. 58; Byers v. Byers, 21 Ia. 268; Biffle v. Pullam, 114 Mo. 50, 21 S. W. 450; Stanley v. Sullivan, 71 Wis. 535, 37 N. W. 801, 5 Am. St. R. 245; *contra*, Fraaman v. Fraaman, 64 Neb. 472, 90 N. W. 245, 97 Am. St. R. 650; Winter v. Winter (Neb.), 145 N. W. 709, 50 L. R. A. (N. S.) 697.

the rights of a "head of a family."[25] The court in a recent case remarks: "If the defendant can create a condition with which to successfully defend himself against the decree of the court, then it may well be doubted whether the decree is of any use. The law ought not to permit him to construct a shield that will protect him in his marital and domestic recklessness. By getting married again he ought not to be permitted to relieve himself from the burden of supporting the child that he caused to come into the world."

§ 1756. Alimony Not Barred by Bankruptcy.

Alimony due or to become due is expressly excepted from the operation of a discharge in bankruptcy by the amendment of 1903, and a foreign judgment on a decree for alimony does not so merge the alimony claim that it is barred by the discharge. The court remarks on the absurd result that would follow if it were held that the first judgment were not barred, while the second was, and that the court has a right to look behind the record and ascertain the real cause of action.[26]

25. Winter v. Winter (Neb.), 145 N. W. 709, 50 L. R. A. (N. S.) 697; Anderson v. Norvell-Shapleigh Hardware Co., 134 Mo. App. 188, 113 S. W. 733.

26. *Re* Williams, 208 N. Y. 32, 101 N. E. 853, 46 L. R. A. (N. S.) 719.

CHAPTER XXX.

JURISDICTION TO AWARD ALIMONY.

SECTION 1757. Power of Courts.
1758. Jurisdiction Based on Petition for Divorce.
1759. Jurisdiction Where Plaintiff Is Not a Resident.
1760. Jurisdiction Over Property Rights Within Jurisdiction.
1761. Jurisdiction Over Land Outside of Jurisdiction.
1762. Personal Service Necessary.

§ 1757. Power of Courts.

The court has only the power to decree alimony conferred by statute,[27] and in some States in equity.[28]

A petition for alimony should be heard, if possible, by the judge who heard the divorce case.[29]

§ 1758. Jurisdiction Based on Petition for Divorce.

An application for divorce gives the court jurisdiction to award alimony.[30]

Where a wife has been abandoned by her husband she may be

27. *Ex parte* Helmert, 103 Ark. 571, 147 S. W. 1153; Bialy v. Bialy, 167 Mich. 559, 133 N. W. 496; Maslen v. Anderson, 163 Mich. 477, 128 N. W. 723, 17 Det. Leg. N. 953; Austin v. Austin, 173 Mich. 47, 138 N. W. 237; Bodie v. Bates, 156 N. W. 8; Wallace v. Wallace, 75 N. H. 217, 72 A. 1033.

An agreement for the separate maintenance of a wife, entered into before divorce does not oust the court of jurisdiction to award alimony. Levy v. Levy, 133 N. Y. S. 1084, 149 App. Div. 561; De Vall v. De Vall, 57 Ore. 128, 109 P. 755; Drake v. Drake, 27 S. D. 329, 131 N. W. 294; Warne v. Warne, 156 N. W. 60; Brenger v. Brenger, 142 Wis. 26, 125 N. W. 109. See Pryor v. Pryor, 88 Ark. 302, 114 S. W. 700.

28. Delbridge v. Sears (Ia.), 160 N. W. 218; Spratler v. Spratler (Mich.), 169 N. W. 956.

29. Mincer v. Rohnert, 163 Mich. 628, 128 N W. 734, 17 Det. Leg. N. 975.

30. Allen v. Allen (Ark.), 189 S. W. 841; Bushnell v. Bushnell, Ill. 1919; Ensign v. Ensign, 105 N. Y. S. 1114, 120 App. Div. 882 (where residence of parties is in doubt); Burns v. Burns (Tex. Civ. App. 1910), 126 S. W. 333.

awarded alimony without divorce on his petition for divorce on a prayer in her answer asking relief.[31]

Courts of equity may have original jurisdiction to award alimony independently of a bill for divorce even though the wife does not prove facts sufficient to warrant a divorce. Such a case exists where the husband insists that the wife live with his family, who treat her without consideration and in such a way as to humiliate her and make it impossible for her to remain with them.[32]

§ 1759. Jurisdiction Where Plaintiff Is Not a Resident.

Where alimony is an independent action, the fact that the plaintiff has not been a resident of the State the period required for a divorce will not bar the court from awarding her alimony,[33] and alimony may be ordered even though the husband brings suit in a court having no jurisdiction.[34]

A separate suit for alimony may be brought wherever the defendant may be found or has property to be attached. even though the plaintiff is a non-resident.[35]

§ 1760. Jurisdiction Over Property Rights Within Jurisdiction.

And jurisdiction of the parties carries with it authority to adjust property rights of the parties to property within the jurisdiction,[36] except that the court may make orders subjecting the land of the defendant to alimony if it is in the State, although the defendant is a non-resident not served with process.[37]

31. Huff v. Huff (W. Va.), 80 S. E. 846, 51 L. R. A. (N. S.) 282.

32. Spafford v. Spafford (Ala.), 74 So. 354, L. R. A. 1917D, 773.

33. Hulett v. Hulett, 80 Ky. 364, 4 Ky. Law Rep. 193 (plaintiff need not be resident of State for one year).

34. Odum v. Odum, 132 Ga. 437, 64 S. E. 470. See Dahne v. Superior Court in and for San Diego County, 31 Cal. App. 664, 161 P. 280.

35. McCormick v. McCormick, 82 Kan. 31, 107 P. 546.

36. Huneke v. Huneke, 12 Cal. App. 199, 107 P. 131 (community property); Hays v. Hays, 75 Neb. 728, 106 N. W. 773. See Glass v. Glass, 4 Cal. App. 604, 88 P. 734; Catton v. Catton, 69 Wash. 130, 124 P. 387 (may dispose of real estate in another county).

37. Rea v. Rea, 123 Ia. 241, 98 N. W. 787; Chapman v. Chapman

Where, at the time suit for divorce against a non-resident defendant is first begun, a preliminary order is entered ordering the bank where the defendant keeps his account in the State not to pay out any of the deposit, and then later a decree for divorce is rendered on substituted service, the court may order the bank to pay the defendant's money in its possession to the plaintiff as alimony.

The Fourteenth Amendment did not "abridge the jurisdiction which a State possessed over property within its borders regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property. Indebtedness due from a resident to a non-resident — of which bank deposits are an example — is property within the State."

It was claimed that alimony could not be collected by a proceeding *quasi in rem*, as no debt existed at the commencement of the action, but the obligation to pay alimony arises only as a result of the suit.

The court remarks, however, that the distinction is without legal significance, as the power of the State to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim, and it is immaterial that the claim is at the commencement of the suit inchoate, to be perfected only by time or the action of the court. The only essentials to the exercise of the State's power are presence of the *res* within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. The injunction is an effective seizure for this purpose.[38]

§ 1761. Jurisdiction Over Land Outside of Jurisdiction.

And the court may even order a conveyance of land outside the

(Mo. App.), 185 S. W. 221; Bailey v. Bailey, 127 N. C. 474, 37 N. E. 502.

38. Pennington v. Fourth National Bank, 243 U. S. 269, 61 L. Ed. 703, 37 Sup. Ct. R. 282, L. R. A. 1917F, 1159.

Where no attachment was made, however, at the commencement of suit it has been held that a void decree for alimony rendered on substituted service cannot be enforced against a defendant's property within the State.

jurisdiction, such decree operating *in personam* and not being a conveyance in itself.[39]

§ 1762. Personal Service Necessary.

A petition for alimony is not a new or independent proceeding such that a new service is required, but is merely incidental to the original suit.[40] But a judgment for alimony is *in personam*, and hence even in courts which formerly held the doctrine that the marriage status could be fixed without personal service, alimony may be ordered only after personal service on the defendant,[41] and after giving the defendant an opportunity to be heard,[42] and jurisdiction of alimony cannot be conferred by consent of parties.[43]

So an order to a bank to pay over money belonging to the husband is void without giving the bank an opportunity to be heard.[44]

McGuinness v. McGuinness, 72 N. J. Eq. 381, 68 A. 768, reversing 71 N. J. Eq. 1, 62 A. 937.

39. Matson v. Matson (Ia.), 173 N. W. 127; see *post*, § 1975.

40. Wells v. Wells, 209 Mass. 282, 95 N. E. 845, 35 L. R. A. (N. S.) 561.

41. Hekking v. Pfaff (U. S. C. C. A. Mass. 1898), 91 F. 60, 33 C. C. A. 328, 43 L. R. A. 618; Baker v. Baker, 136 Cal. 302, 68 P. 971; Stodghill v. Stodghill (Ga.), 88 S. E. 676; Hood v. Hood, 130 Ga. 610, 61 S. E. 471; Fleming v. West, 98 Ga. 778, 27 Ga. 157; Proctor v. Proctor, 215 Ill. 275, 74 N. E. 145, 106 Am. St. R. 168; Karcher v. Karcher, 204 Ill. App. 210; Mead v. Mead, 205 Ill. App. 327; Kell v. Kell (Ia.), 161 N. W. 634; Johnson v. Matthews, 124 Ia. 255, 99 N. W. 1064; State *ex rel.* Hart v. St. Paul, 104 La. 6, 28 So. 915 (alimony will not be ordered while question of jurisdiction is pending); Baker v. Jewell, 114 La. 726, 38 So. 532; McSherry v. McSherry, 113 Md. 395, 77 A. 653; West v. West, 2 Mass. 223; Ellison v. Martin, 53 Mo. 575; Hamill v. Talbot, 81 Mo. App. 210; Edwards v. Edson, 104 N. Y. S. 292, 119 App. Div. 684; Massey v. Stimmel, 15 Ohio Cir. Ct. R. 439, 8 O. C. D. 237; Smith v. Smith, 74 Vt. 20, 51 A. 1060, 93 Am. St. R. 882; Mallette v. Scheerer, 164 Wis. 415, 160 N. W. 182.

42. Hughes v. Kepley, 60 Kan. 859, 58 P. 556 (striking answer from files does not prevent hearing on question of alimony); Wade v. Wade, 158 N. Y. S. 555; Coger v. Coger, 48 W. Va. 135, 35 S. E. 823.

43. Cizek v. Cizek, 69 Neb. 797, 99 N. W. 28.

44. *In re* Wiley (Mich.), 171 N. W. 486.

CHAPTER XXXI.

TEMPORARY ALIMONY.

SECTION 1763. Authorized by Statute.
1764. Jurisdiction in Equity.
1765. Incident to Divorce.
1766. Necessity of Notice to Husband.
1767. Allowance to Husband.
1768. Validity of Marriage.
1769. Fault of Parties.
1770. Needs of Wife.
1771. Amount of Award.
1772. Effect of Agreement Releasing Marital Obligations.
1773. Order for Temporory Alimony Not a Debt of Record.
1774. Modification of Order.
1775. Appeal from Order.
1776. Power of Appellate Court or of Lower Court Pending on Appeal.

§ 1763. Authorized by Statute.

Alimony *pendente lite,* or temporary, is frequently found a matter of statute direction.[45] Independently of statute, it is allowable, on petition (though some of our American States certainly have held otherwise).

§ 1764. Jurisdiction in Equity.

At common law neither party had a separate right of action in equity to compel support. Modern decisions first accorded this right to support *pendente lite,* pending divorce proceedings, as an incident to the equitable divorce relief sought.[46]

The next step in the same line was the recognition by the courts of equity of the right in the wife to, independently of divorce, maintain an action for alimony or support, and procure judgment from the husband, as to which the courts of this country are in conflict. The early common-law rule was followed on that ques-

45. Webber v. Webber, 79 N. C. 572.

46. Hagert v. Hagert (N. D.), 133 N. W. 1035, 38 L. R. A. (N. S.) 966.

tion in many jurisdictions and the right denied, the courts conceding themselves powerless to afford relief until statute clothed them with express authority. But gradually the trend of authority turned in favor of the maintenance of such an action. Much confusion existed on account of the fact that the English equity courts had frequently refused jurisdiction, considering that such matters more properly lay with the ecclesiastical courts. The greater weight of authority, however, is now in favor of the right to maintain such an action as a matter of equitable jurisdiction.[47] In other States such right is granted by statute.[48] The basis of these cases is that the moral right to support being conceded, the court sitting in equity will enforce it.

This same reasoning applies to give the husband, where he has a right of support, the right in equity to a decree entitling him to support where he is destitute and the wife has funds.[49] So where the wife has property valued at $30,000, and the husband is destitute and a paralytic, the wife will be ordered to support him, independently of statute or of the pendency of divorce proceedings.[50]

§ 1765. Incident to Divorce.

In some States alimony can be allowed only in an action for

47. Clisby v. Clisby, 160 Ala. 572, 49 So. 445; Wood v. Wood, 54 Ark. 172, 15 S. W. 459; Williams v. Williams, 136 Ky. 571, 123 S. W. 337; Parker v. Parker, 134 Ga. 316, 67 S. E. 812; Reifschneider v. Reifschneider, 144 Ill. App. 119; Graves v. Graves, 36 Ia. 310, 14 Am. R. 525; Baier v. Baier, 91 Minn. 165, 97 N. W. 671; Hagert v. Hagert (N. D.), 133 N. W. 1935, 38 L. R. A. (N. S.) 966; Cureton v. Cureton, 117 Tenn. 103, 96 S. W. 608; Almond v. Almond, 4 Rand. (Va.) 662, 15 Am. Dec. 781; Branscheid v. Brancheid, 27 Wash. 368, 67 P. 812; Lang v. Lang (W. Va.), 73 S. E. 716, 38 L. R. A. (N. S.) 950.

48. Shaw v. Shaw, 2 App. D. C. 204; Enslin v. Enslin (N. J. Eq.), 37 A. 442; Blackinton v. Blackinton, 141 Mass. 432, 5 N. E. 830; Meyerl v. Meyerl, 125 Mich. 607, 84 N. W. 1109.

49. Livingston v. Superior Ct., 117 Cal. 633, 49 P. 836, 38 L. R. A. 175; Hagert v. Hagert (N. D.), 133 N. W. 1035, 38 L. R. A. (N. S.) 966.

50. Hagert v. Hagert (N. D.), 133 N. W. 1035, 38 L. R. A. (N. S.) 966.

divorce,[51] or where annulment of marriage is sought by husband or wife,[52] and not to enable the wife to prosecute a suit to set aside a divorce,[53] or where there is no pending suit for divorce until there is a proceeding for permanent alimony.[54]

The order must be made before a final decree in divorce,[55] but the fact that a motion for modification of a final decree is pending will render the suit still pending so that temporary alimony may be ordered.[56]

An order for alimony cannot be made in an original proceeding for the purpose of prohibiting the trial judge from exceeding his powers.[57]

§ 1766. Necessity of Notice to Husband.

Alimony, being a personal judgment, can be allowed only after appearance by the husband or service on him,[58] but may be made

51. Wallace v. Wallace, 75 N. H. 217, 72 A. 1033.

In a wife's suit for legal separation, an allowance of alimony was unauthorized. Randolph v. Field, 146 N. Y. S. 247, 84 Misc. 403.

In no suit but one seeking a divorce, is there jurisdiction to award alimony *pendente lite*. Chapman v. Parsons, 66 W. Va. 307, 66 S. E. 461.

52. Vroom v. Marsh, 29 N. J. Eq. 15; Allen v. Allen, 59 How. (N. Y.) Pr. 27; Bloodgood v. Bloodgood, 59 How. (N. Y.) Pr. 42.

53. Wilson v. Wilson, 49 Ia. 544.

54. Stalvey v. Stalvey, 132 Ga. 307, 64 S. E. 91; Stallings v. Stallings, 127 Ga. 464, 56 S. E. 469; Combs v. Combs, 146 Ga. 112, 90 S. E. 862.

55. Stewart v. Stewart, 101 Ark. 86, 141 S. W. 193; Sanders v. Sanders, 157 N. C. 229, 72 S. E. 876; Luse v. Luse, 144 Ia. 396, 122 N. W. 970; Moross v. Moross, 129 Mich. 27, 87 N. W. 1035, 8 Det. Leg. N. 825 (fraud on court by conveyance of property to avoid alimony will not justify bill for alimony 12 years after decree in divorce).

Alimony after decree. It is within the discretion of the trial court to include in the final decree provisions for the temporary support of the wife and children during the period following the final decree, and before compliance with its terms as to permanent alimony. Delor v. Donovan, 157 Mich. 587, 122 N. W. 196, 16 Det. Leg. N. 470.

56. Smith v. Smith, 144 S. W. 1199, 164 Mo. App. 439, adopting opinion 151 Mo. App. 649, 132 S. W. 312.

57. *In re* Callahan (Idaho), 164 P. 356.

58. *Ex parte* Joutsen, 154 Cal. 540, 98 P. 391; Baker v. Baker, 136 Cal. 302, 68 P. 971; Reed v. Reed (Cal. App.), 180 P. 43; Pitts v. Pitts, 144 Ga. 423, 87 S. E. 391.

even before the return day when the husband has appeared to question the jurisdiction.[59]

Even though an order for alimony is made *pendente lite* at an *ex parte* hearing at which the court refuses to hear testimony on the part of the libellee, still this is not an abuse of discretion of which he can complain when the court advises him that he can file a motion to reduce the award and he fails to do so.[60]

§ 1767. Allowance to Husband.

A statute allowing alimony to the wife is exclusive and will not justify its payment to the husband,[61] although the husband may have such right in equity,[62] and temporary maintenance is such, under some codes, that the court may direct either party to contribute to the support of the other.[63]

§ 1768. Validity of Marriage.

Usually no order for temporary alimony can be made until a valid marriage is proved,[64] since only a wife has the right to claim it.[65]

Alimony *pendente lite* may be allowed, however, on *prima facie* evidence of a marriage,[66] or of a *de facto* marriage,[67] and not in the absence of evidence of marriage.[68] But such alimony has been

59. Morick v. Morick (Mo. App.), 196 S. W. 1029.

60. Fowler v. Fowler (Okla.), 161 P. 227, L. R. A. 1917C, 89.

61. State v. Templeton, 18 N. D. 525, 123 N. W. 283.

62. See *ante*, § 1764.

63. Small v. Small, 42 Ia. 111.

64. Harron v. Harron, 128 Cal. 303, 60 P. 932; Paul v. Paul, 201 Ill. App. 595.

65. Collins v. Collins, 71 N. Y. 269, 80 N. Y. 1.

66. *Ex parte* Jones, 172 Ala. 186, 55 So. 491; Fountain v. Fountain, 80 Ark. 481, 97 S. W. 656; Hite v. Hite, 124 Cal. 389, 57 P. 227, 45 L. R. A. 793, 71 Am. St. R. 82, reversing 55 P. 900; Lau v. Lau, 140 N. Y. S. 310, order affirmed 141 N. Y. S. 1128, 156 App. Div. 912.

67. Eickhoff v. Eickhoff, 29 Colo. 295, 68 P. 237, 93 Am. St. R. 64.

68. Banks v. Banks, 42 Fla. 362, 29 So. 318; McKenna v. McKenna, 70 Ill. App. 340; Reed v. Reed, 85 Miss. 126, 37 So. 642; Carroll v. Carroll, 68 Mo. App. 190 (where husband claims marriage has been dissolved alimony will be awarded as dissolution only shown on trial); Chapman v. Parsons, 66 W. Va. 307, 66 S. E. 461.

allowed where the marriage was void on account of the husband's prior marriage still undissolved.[69]

§ 1769. Fault of Parties.

It seems to be the general rule that temporary alimony will be allowed only where the wife presents probable grounds for success in her suit as plaintiff,[70] and shows merit in her cause,[71] or where the husband has condoned the wife's improprieties,[72] and may be denied where the wife was at fault.[73] In case of doubt as to who was at fault the court may order alimony *pendente lite,*[74] or where the evidence is conflicting the court may refuse it.[75]

Where the wife is the defendant she may be allowed alimony *pendente lite* where she denies the allegations of the bill,[76] or where she reconvenes praying for relief she is to that extent in the position of a plaintiff and entitled to ask for alimony *pendente lite.*[77]

Temporary alimony is in many States allowed as a matter of course to a dependent wife living apart or deserted by her husband

69. Leckney v. Leckney, 26 R. I. 441, 59 A. 311.

70. Standley v. Standley, 143 Ill. App. 278; Heyman v. Heyman, 104 N. Y. S. 227, 119 App. Div. 182; Post v. Post, 105 N. Y. S. 910, 55 Misc. 538; Ensign v. Ensign, 105 N. Y. S. 917, 54 Misc. 289, 291.

Where the facts, if as claimed by plaintiff wife, would warrant separate maintenance, it is proper to order the payment of alimony *pendente lite.* Kamman v. Kamman, 152 N. Y. S. 581, 167 App. Div. 426. See *post,* § 1803.

71. Slocum v. Slocum, 86 Ark. 469, 111 S. W. 806; Hochreiter v. Hochreiter, 138 Ill. App. 373; Page v. Page, 161 N. C. 170, 76 S. E. 619; Suydam v. Suydam, 79 N. J. Eq. 144, 80 A. 1057; Greenberg v. Greenberg, 119 N. Y. S. 227, 134 App. Div. 419; Abramowitz v. Abramowitz, 140 N. Y. S. 275; *contra,* Crane v. Crane, 128 Md. 214, 97 A. 535.

72. Kendrick v. Kendrick, 105 Ga. 38, 31 S. E. 115.

73. Singletary v. Singletary, 130 Ga. 435, 60 S. E. 1048; George v. George, 130 Ga. 608, 61 S. E. 401; Wills v. Wills, 168 Ky. 35, 181 S. W. 619; Seism v. Seism, 184 Mo. App. 543, 167 S. W. 455.

74. Woodruff v. Woodruff, 131 Ga. 451, 62 S. E. 526.

75. Thomas v. Thomas (Ga.), 97 S. E. 523.

76. Suydam v. Suydam, 79 N. J. Eq. 144, 80 A. 1057; Brown v. Brown, 145 N. Y. S. 471, 83 Misc. 597.

77. Nissen v. Farquhar, 121 La. 642, 46 So. 679; Welsh v. Badeaux, 131 La. 469, 59 So. 905.

without looking into the merits of the case at all,[78] and may be at the court's discretion, not only where the wife is plaintiff, but where she is defendant, and chargeable with misconduct,[79] but not in all cases.[80]

§ 1770. Needs of Wife.

The Married Women's Acts have changed the old rule under which temporary alimony was allowed as of course, and now it will be allowed only on proof of destitution of the wife or inability to maintain herself.[81]

Two elements are material in the award of alimony: the wife's needs and the husband's ability to pay. As to temporary alimony and suit-money, the rule is that no allowance shall be made where the wife has sufficient means of her own;[82] by which is not meant, however, that the latter must consume the principal of her separate estate, since income is chiefly regarded.[83]

Under some statutes temporary alimony is allowed only for the

78. Sparks v. Sparks, 25 App. D. C. 356; Dicus v. Dicus, 131 Md. 87, 101 A. 697; Wygodsky v. Wygodsky (Md.), 106 A. 698.

79. Vroom v. Marsh, 29 N. J. Eq. 15; McFarland v. McFarland, 51 Ia. 565. But see Reeves v. Reeves, 82 N. C. 348. It is not matter of right, but rests in the sound discretion of the court. Countz v. Countz, 30 Ark. 73. Temporary alimony is due the wife, even though the husband's misconduct was the result of insane delusion, as jealousy. Smith v. Smith, 33 N. J. Eq. 458.

80. Bradford v. Bradford, 80 Miss. 467, 31 So. 963 (where wife's suit for divorce is solely to recover property); Robinson v. Robinson, 82 N. J. Eq. 466, 88 A. 951 (where wife knew at time of her marriage that she was still married to another); Le Bowski v. Le Bowski, 59 N. Y. S. 499, 27 Misc. 759 (not in actions for separation); Masey v. Masey, 68 N. Y. S. 994, 58 App. Div. 619 (where wife files counterclaims); Israel v. Israel, 59 N. Y. S. 800, 28 Misc. 57; State v. Superior Court of King County, 55 Wash. 347, 104 P. 771 (only on equitable grounds).

81. Rutledge v. Rutledge (Mo. App. 1909), 119 S. W. 489.

82. This applies where they have lived apart, and the wife has provision under articles of separation. Collins v. Collins, 80 N. Y. 1. And see, generally, D'Aguilar v. D'Aguilar, 1 Hag. Ec. 773.

83. Miller v. Miller, 75 N. C. 70.

current needs of the wife, and the fact that she has incurred debts is not of itself reason for an allowance.[84]

Under statutes in many States the wife is entitled to alimony *pendente lite* in many cases of need,[85] and the trial court usually has power to order the payment of alimony and counsel fees *pendente lite* where the wife is without separate means,[86] or where the wife's means are insufficient to support her,[87] and not where

84. Tremper v. Tremper (Cal. App.), 177 P. 868.

85. Rast v. Rast, 113 Ala. 319, 21 So. 34; Webb v. Webb, 140 Ala. 362, 37 So. 96, 103 Am. St. R. 30; Simpson v. Simpson, 21 Cal. App. 150, 131 P. 99; Harmon v. Harmon (Del. Super. 1904), 58 A. 1042, 5 Pennewill, 152; Killingsworth v. Killingsworth (Ga.), 97 S. E. 539; McGee v. McGee, 10 Ga. 477; Thomas v. Thomas, 109 Ill. App. 352; Jones v. Jones, 111 Ill. App. 396; Musselman v. Musselman, 44 Ind. 106; Hamilton v. Hamilton, 129 Ia. 628, 106 N. W. 5; Hill v. Hill, 6 Ky. Law R. (abstract) 216; State *ex rel.* Hill v. Judge of Civil Dist. Court, 114 La. 44, 38 So. 14; Mulhall v. Mulhall, 120 Md. 22, 87 A. 490; Haines v. Haines, 35 Mich. 138; Penningroth v. Penningroth, 71 Mo. App. 438 (for maintenance of children); Stark v. Stark, 115 Mo. App. 436, 91 S. W. 413; Jellison v. Jellison, 70 N. H. 633, 47 A. 612; Bressette v. Bressette, 88 N. Y. S. 580, 95 App. Div. 167; Davis v. Davis, 150 N. Y. S. 636; Hawley v. Hawley, 88 N. Y. S. 606, 95 App. Div. 274; Adkins v. Adkins, 33 Ohio Cir. Ct. R. 592; Poloke v. Poloke, 37 Okla. 70, 130 P. 535; Ames v. Ames, 7 Pa. Super. Ct. 456, 4 Lack. Leg. N. 199, 21 Pa. Co. Ct. R. 257.

86. Coleman v. Coleman (Ala.), 73 So. 473 (temporary alimony a matter of right); Jones v. Jones (Colo.), 160 P. 87; Morgan v. Morgan, 25 App. D. C. 389; Paul v. Paul, 278 Ill. 196, 115 N. E. 860; McCue v. McCue, 149 Ind. 466, 49 N. E. 382; Mengel v. Mengel, 157 Ia. 630, 138 N. W. 495; Hulett v. Hulett, 80 Ky. 364, 4 Ky. Law Rep. 193; State *ex rel.* Dawson v. St. Louis Court of Appeals, 99 Mo. 216, 12 S. W. 661; Percival v. Percival, 124 N. Y. 637, 26 N. E. 540; Miers v. Miers, 71 N. Y. S. 1058, 35 Misc. 476, 10 N. Y. Ann. Cas. 174; Conrad v. Conrad, 107 N. Y. S. 1095, 123 App. Div. 384 (only when plaintiff shows she has reasonable grounds for success).

87. Cooper v. Cooper, 85 Ill. App. 575, judgment affirmed, 185 Ill. 163, 56 N. E. 1059; Busenbark v. Busenbark, 33 Kan. 572, 7 P. 245 (where husband files cross-petition to her bill); Nissen v. Farquhar, 121 La. 642, 46 So. 679; Ross v. Ross, 89 Miss. 66, 42 So. 382; Shearer v. Shearer (Mo. App.), 189 S. W. 592; Speiser v. Speiser, 188 Mo. App. 328, 175 S. W. 122; Coen v. Coen, 130 Mo. App. 480, 109 S. W. 1083; Robertson v. Robertson, 137 Mo. App. 93, 119 S. W. 533; Mahn v. Mahn, 70 Mo. App. 337; Rumping v. Rumping, 41 Mont. 33, 108 P. 10; Jones v. Jones, 173 N. C. 279, 91 S. E. 960; Bailey v. Bailey, 127 N. C. 474, 37 S. E. 502; Graves v.

the wife is complainant and she has means sufficient for her support.[88]

Where, in a suit by a husband against his wife for divorce, she shows herself to be without means and dependent, a suitable allowance should be made for her support,[89] but it will not be allowed where the husband is complainant and the wife has means sufficient for her defence and support.[90]

Where the husband continues to support the wife during the pendency of the suit no allowance will be made.[91]

§ 1771. Amount of Award.

The question of the amount of the alimony to be allowed *pendente lite* is in the sound discretion of the trial court,[92] and enough

Graves, 128 N. Y. S. 499 (although wife worth $7,000); Mossa v. Mossa, 107 N. Y. S. 1044, 123 App. Div. 400 (error to make temporary alimony dependent on husband's offer to provide a home); Hollerman v. Hollerman (N. Y. Sup. 1847), 1 Barb. 64; Hunter v. Hunter, 79 N. Y. S. 618, 78 App. Div. 631; Weigand v. Weigand, 92 N. Y. S. 679, 103 App. Div. 42, 34 Civ. Proc. R. 186; Vaughn v. Vaughn, 85 N. Y. S. 443, 89 App. Div. 611; Williams v. Williams (Tex. Civ. App. 1910), 125 S. W. 937, 1199.

A wife will not be compelled to sell or pawn her diamond rings or piano to obtain money to live on and pay the expenses of her divorce action where her husband has property valued at more than $5,000 and receives a salary of $75 a month. Davis v. Davis, 174 Mo. App. 538, 160 S. W. 829.

88. Richardson v. Richardson, 94 N. Y. S. 582; Ashbrooke v. Ashbrooke, 116 N. Y. S. 1100, 132 App. Div. 907.

89. Libbe v. Libbe, 157 Mo. App. 701, 138 S. W. 685.

90. Carlin v. Carlin, 65 Ill. App. 160; Stiehm v. Stiehm, 69 Minn. 461, 72 N. W. 708 (fact that wife has separate property is not controlling); Lambert v. Lambert, 109 Mo. App. 19, 84 S. W. 203; Brand v. Brand, 166 N. Y. S. 90.

91. Bülke v. Bülke, 173 Ala. 138, 55 So. 490; McCloskey v. McCloskey, 68 Mo. App. 199.

92. Rast v. Rast, 113 Ala. 319, 21 So. 34; Lawrence v. Lawrence, 141 Ala. 356, 37 So. 379; Plant v. Plant, 63 Ark. 128, 37 S. W. 308; Sparks v. Sparks, 25 App. D. C. 356; Dunnington v. Dunnington, 45 App. D. C. 277; Jacobi v. Jacobi, 45 App. D. C. 442; Pearson v. Pearson, 125 Ga. 132, 54 S. E. 194; Kendrick v. Kendrick, 105 Ga. 38, 31 S. E. 115; Helton v. Helton, 146 Ga. 48, 90 S. E. 381; Heaton v. Heaton, 102 Ga. 578, 27 S. E. 677; Arado v. Arado, 281 Ill. 123, 117 N. E. 816; Cooper v. Cooper, 85 Ill. App. 575, judgment affirmed

should be awarded sufficient for the decent support and maintenance of the wife and child in proportion to the husband's means.[93]

§ 1772. Effect of Agreement Releasing Marital Obligations.

An agreement between husband and wife by which each released the other from marital obligations is no defence to a petition in the wife's suit for divorce for temporary alimony and suit-money. Where the marriage relation is admitted, the court has the right to provide the wife with funds to enable her to have her rights determined, and may make any reasonable allowance for the purpose.[94]

§ 1773. Order for Temporary Alimony Not a Debt of Record.

An order for temporary alimony is not such a final and complete judgment that it can be called a debt of record, and cannot be sued upon in the courts of another State, as it is subject at any time to vacation.[95]

185 Ill. 163, 56 N. E. 1059; Gray v. Gray, 74 Ill. App. 509; Snider v. Snider, 179 Ind. 583, 102 N. E. 32; Corey v. Corey, 81 Ind. 469 (wife's agreement with attorneys not binding as to amount); Main v. Main, 150 N. W. 590; Campbell v. Campbell, 21 Ky. Law Rep. 19, 50 S. W. 849; Mulhall v. Mulhall, 120 Md. 22, 87 A. 490; Winkler v. Winkler, 104 Miss. 1, 61 So. 1; State *ex rel.* Gercke v. Seddon, 93 Mo. 520, 6 S. W. 342; Davis v. Davis, 174 Mo. App. 538, 160 S. W. 829; Collett v. Collett, 170 Mo. App. 590, 157 S. W. 90; Weber v. Weber, 195 Mo. App. 126, 189 S. W. 579; Bender v. Bender, 190 Mo. App. 572, 176 S. W. 284; Fullhart v. Fullhart, 109 Mo. App. 705, 83 S. W. 541; Brasch v. Brasch, 50 Neb. 73, 69 N. W. 392; Moore v. Moore, 130 N. C. 333, 41 S. E. 943; Barker v. Barker, 136 N. C. 316, 48 S. E. 733; Bissell v. Bissell (N. Y. Sup. 1847), 1 Barb. 430; Lynn v. Lynn, 68 Pa. Super. Ct. 324; Brunson v. Brunson, 94 S. C. 11, 77 S. E. 704; Read v. Read, 28 Utah, 297, 78 P. 675; Wass v. Wass, 42 W. Va. 460, 26 S. E. 440.

93. Nissen v. Farquhar, 121 La. 642, 46 So. 679.

94. Robinson v. Robinson (Wash.), 151 P. 1128, L. R. A. 1916B, 919.

95. Henry v. Henry, 74 W. Va. 563, 82 S. E. 522, L. R. A. 1916B, 1024. See further *post*, § 1861 *et seq.*

§ 1774. Modification of Order.[96]

The court has power to modify any decree of alimony made *pendente lite* while the cause is still pending before it from the nature of the situation.[97]

§ 1775. Appeal from Order.

An order granting alimony *pendente lite* is not appealable, but an appeal does lie from an order adjudging the libellee in contempt for failing to obey the order for alimony *pendente lite*.[98]

§ 1776. Power of Appellate Court or of Lower Court Pending an Appeal.

The weight of authority supports the view that appellate courts possess inherent power to allow alimony, suit-money and attorney's fees pending an appeal, and may make such allowance as the circumstances warrant. This power seems necessary by reason of the nature of the case for the protection of wives who might otherwise find it impossible to be represented before the appellate court.[99]

Where the power to award counsel fees and temporary alimony is not expressly given to the appellate court, it may be implied as a necessary incident of appellate jurisdiction, as in aid of that jurisdiction the court has power to protect that jurisdiction and to make the decisions of the court thereunder effective. A grant of jurisdiction implies that there is included in it the power necessary to its effective exercise and to make all orders that will preserve the subject of the action and give effect to the final determination of the appeal.[1]

After an appeal has been taken from a final decree of divorce

96. See further *post*, § 1828 *et seq.*

97. Ruge v. Ruge (Wash.), 165 P. 1063, L. R. A. 1917F, 721.

98. Fowler v. Fowler (Okla.), 161 P. 227, L. R. A. 1917C, 89.

99. Breen v. Breen, 159 Mich. 389, 123 N. W. 1106, 16 Det. Leg. N. 905; Prine v. Prine, 36 Fla. 676, 18 So. 781; Wagner v. Wagner, 36 Minn. 239, 30 N. W. 766; Disborough v. Disborough, 51 N. J. Eq. 306, 28 A. 3; Taylor v. Taylor (N. M.), 142 P. 1129, L. R. A. 1915A, 1044.

1. Kjellander v. Kjellander, 90 Kan. 102, 132 P. 1170, 45 L. R. A. (N. S.) 943.

awarding alimony, and the appeal perfected, the lower court has no authority to award temporary alimony pending the appeal, as the appeal takes the case before the upper court and deprives the lower court of any jurisdiction whatever.[2]

2. *Ex parte* Farrell (Ala.), 71 So. 462, L. R. A. 1916F, 1257, and note showing many cases taking the opposite view.

CHAPTER XXXII.

ALLOWANCE FOR COUNSEL FEES AND EXPENSES.

SECTION 1777. Allowance; In General.
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1790. Wife's Liability.
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§ 1777. Allowance in General.

Upon the same principle that a wife should have her legal rights and remedies from the purse which the law commits to the husband, her counsel and solicitor's fees are also allowable by divorce codes and practice, to a reasonable extent, from her husband's means.[3]

In the absence of statute on the subject, the propriety of an allowance to the wife for counsel fees and expenses in a divorce suit depends on the general principles of law, according to which

3. The wife is not to contract at pleasure for counsel, but order for compensation is to be requested of the court. Cook v. Walton, 38 Ind. 228; Moe v. Moe, 39 Wis. 308; Newman v. Newman, 69 Ill. 167; Ottaway v. Hamilton, 26 W. R. 783; Allen v. Allen, 59 How. (N. Y.) Pr. 27; De Llamosas v. De Llamosas, 62 N. Y. 618; Glenn v. Hill, 50 Ga. 94; Jenkins v. Jenkins, 91 Ill. 167; Gossett v. Patten, 23 Kan. 340. As to pledging

such allowance depends on the good faith of the suit, the probability of success and the financial condition of the parties.[4]

It is commonly provided that the wife may be allowed sums to enable her to protect her rights before the court for counsel fees or expenses,[5] whether she be plaintiff [6] or defendant.[7]

§ 1778. Evidence of Valid Marriage.

As the right to fees depends on the existence of the relationship of husband and wife, they can only be allowed after evidence of a valid marriage,[8] and not where the marriage was void on account of the wife's prior marriage.[9]

the husband's credit for the legal expenses, as necessaries, see *supra*, § 93.

4. Ortman v. Ortman (Ala.), 82 So. 417; Coleman v. Coleman (Ala.), 73 So. 473; Bülke v. Bülke, 173 Ala. 138, 55 So. 490; State v. Superior Court of King County, 55 Wash. 347, 104 P. 771.

5. Leak v. Leak, 156 F. 474, 84 C. C. A. 284 (for future expenses only under Alaska statute); Steger v. Steger, 165 Ill. 579, 46 N. E. 888, affirmed; Anderson v. Steger, 173 Ill. 112, 50 N. E. 665; Thomas v. Thomas, 109 Ill. App. 352; Fites v. Fites, 62 Ind. App. 396, 112 N. E. 39; Day v. Day, 71 Kan. 385, 80 P. 974; Mulhall v. Mulhall, 120 Md. 22, 87 A. 490; Coffin v. Dunham, 62 Mass. (8 Cush.) 404, 54 Am. Dec. 769; Cooper v. Cooper, 17 Mich. 205, 97 Am. Dec. 182; Winkemeier v. Winkemeier, 42 N. Y. S. 583, 11 App. Div. 201; Cipro v. Cipro, 161 N. Y. S. 408 (not for past expenses).

6. McGee v. McGee, 10 Ga. 477; Van Vleck v. Van Vleck, 47 N. Y. S. 470, 21 App. Div. 272, reversed 47 N. Y. S. 472, 21 App. Div. 631; Hawley v. Hawley, 88 N. Y. S. 606, 95 App. Div. 274; Schmalholz v. Schmallholz, 98 N. Y. S. 510, 111 App. Div. 543; Winslow v. Winslow, 182 S. W. 241.

7. Slocum v. Slocum, 86 Ark. 469, 111 S. W. 806; Baier v. Baier, 91 Minn. 165, 97 N. W. 671; Libbe v. Libbe, 157 Mo. 701, 138 S. W. 685; Suydam v. Suydam, 79 N. J. Eq. 144, 80 A. 1057; Brown v. Brown, 145 N. Y. S. 471, 83 Misc. 597; Halsted v. Halsted, 47 N. Y. S. 814, 21 App. Div. 589; Kunze v. Kunze, 53 N. Y. S. 938, 5 N. Y. Ann. Cas. 8; Dean v. Dean, 96 N. Y. S. 472, 48 Misc. 149; King v. King, 36 Pa. Super. Ct. 33.

8. Hite v. Hite (Cal.), 55 P. 900, reversed (1899) 124 Cal. 389, 57 P. 227, 45 L. R. A. 793, 71 Am. St. R. 82; Paul v. Paul, 201 Ill. App. 595; Hazard v. Hazard, 197 Ill. App. 612; Lau v. Lau, 140 N. Y. S. 310, order affirmed 141 N. Y. S. 1128, 156 App. Div. 912.

9. Barth's Adm'r v. Barth, 102 Ky. 56, 42 S. W. 1116, 19 Ky. Law Rep. 905, 80 Am. St. R. 335.

§ 1779. Discretion of Court.

The matter of allowance of attorney's fees is in the discretion of the court,[10] although it may be error to refuse to grant counsel fees in the absence of evidence of facts which would authorize the judge in the exercise of a sound discretion to refuse them,[11] and where the wife has ample means an allowance may be an abuse of discretion.[12]

§ 1780. Probable Success of Action.

Counsel fees will be allowed especially where the wife presents reasonable grounds for believing that she will sustain her charges against the husband,[13] and where the wife is defendant a denial of

10. Shirey v. Shirey, 87 Ark. 175, 112 S. W. 369; Plaut v. Plaut, 63 Ark. 128, 37 S. W. 308; Stewart v. Stewart, 156 Cal. 651, 105 P. 955; Reed v. Reed (Cal. App.), 180 P. 43; Aiken v. Aiken, 131 Ga. 578, 62 S. E. 820; Hinton v. Hinton, 117 Ga. 547, 43 S. E. 983; Day v. Day, 15 Idaho, 107, 96 P. 431; Arado v. Arado, 281 Ill. 123, 117 N. E. 816; Ginter v. Ginter, 104 N. E. 989; Main v. Main, 150 N. W. 590; Mengel v. Mengel, 157 Ia. 630, 138 N. W. 495; McCarty v. McCarty (Ia.), 169 N. W. 135 ($500 upheld for 30 days' work although wife unsuccessful); Swalp v. Swalp (Kan.), 178 P. 415; Mulhall v. Mulhall, 120 Md. 22, 87 A. 490; Weber v. Weber, 195 Mo. App. 126, 189 S. W. 579; Fullhart v. Fullhart, 109 Mo. App. 705, 83 S. W. 541; Wilkins v. Wilkins, 84 Neb. 206, 120 N. W. 907; Brasch v. Brasch, 50 Neb. 73, 69 N. W. 392; Reed v. Reed, 70 Neb. 779, 98 N. W. 73; Le Roy v. Le Roy, 161 N. Y. S. 503, 175 App. Div. 120; Kamman v. Kamman, 152 N. Y. S. 579, 167 App. Div. 423, modifying judgment (Sup.) 151 N. Y. S. 226; Hartje v. Hartje, 39 Pa. Super. Ct. 490; Fernald v. Fernald, 5 Pa. Super. Ct. 629, 41 Wkly. Notes Cas. 214; Pierce v. Pierce (Wash.), 181 P. 24.

Guilt of wife immaterial. It is within the sound discretion of the trial court, in a divorce action, to require the husband to pay the wife's costs and counsel fees, without reference to whether she is the guilty party. Gibson v. Gibson, 67 Wash. 474, 122 P. 15; Wass v. Wass, 42 W. Va. 460, 26 S. E. 440; Von Trott v. Von Trott, 118 Wis. 29, 94 N. W. 798.

11. Kendrick v. Kendrick, 105 Ga. 38, 31 S. E. 115; Hall v. Hall, 179 S. W. 738.

12. Bailey v. Bailey, 22 N. D. 553, 134 N. W. 747.

13. Dunn v. Dunn, 150 Mich. 476, 114 N. W. 385, 14 Det. Leg. N. 767; Le Roy v. Le Roy, 161 N. Y. S. 503, 175 App. Div. 120; Abramowitz v. Abramowitz, 140 N. Y. S. 275; De Vide v. De Vide, 174 N. Y. S. 774. See Crane v. Crane, 128 Md. 214, 97 A. 535 (counsel fees awarded irrespective of the merits).

the husband's charges will lay the basis for counsel fees,[14] but not usually where it appears that the wife is guilty,[15] or where after a trial it appears that the wife is not entitled to a divorce,[16] where the husband merely defends and brings no counter charges.[17]

The right of a wife to an allowance to enable her to prosecute an appeal is in some States independent from the issues in the divorce suit, and is in no way dependent on the right to a divorce.[18] Under this rule the husband may be taxed for the costs of the wife and attorney's fee even though he was successful, and the wife was not free from blame, if she has not estate sufficient to pay them,[19] and the husband must pay unless the wife is in the wrong and is able to pay.[20]

14. Pitel v. Pitel (N. J. Ch.), 107 A. 145.

15. Callender v. Callender, 15 Ky. Law Rep. (abstract) 63; Hill v. Hill, (Tex. Civ. App. 1910), 125 S. W. 91. See Robbins v. Robbins, 138 Mo. App. 211, 119 S. W. 1075 (suit money may be allowed although wife is guilty).

16. Wald v. Wald, 124 Ia. 183, 99 N. W. 720; *contra*, Mutter v. Mutter, 123 Ky. 754, 97 S. W. 393, 30 Ky. Law Rep. 76.

17. Ehrhardt v. Ehrhardt, 198 Ill. App. 47; Johnson v. Johnson, 57 Kan. 343, 46 P. 700; Bordeaux v. Bordeaux, 29 Mont. 478, 75 P. 359 (may be allowed on motion for new trial after finding against wife).

18. Towson v. Towson (D. C.), 258 F. 517; People v. Mehan, 198 Ill. App. 300; Buckner v. Buckner, 118 Md. 263, 84 A. 471; Libbe v. Libbe, 166 Mo. App. 240, 148 S. W. 460; Hall v. Hall, 179 S. W. 738; Hock v. Hock, 149 N. Y. S. 1027; Cameron v. Cameron, 30 S. D. 634, 139 N. W. 329; *contra*, Balswic v. Balswic, 179 Ill. App. 118. See Strickland v. Strickland, 80 Ark. 451, 97 S. W. 659 (not where husband dead and appeal was to determine property rights); Seeger v. Seeger, 154 Ill. App. 38 (may be denied); Schofield v. Schofield, 51 Pa. Super. Ct. 579.

19. Maddy v. Prevulsky (Ia.), 160 N. W. 762; Wills v. Wills, 168 Ky. 35, 181 S. W. 619; Turner v. Turner, 23 Ky. Law Rep. 370, 62 S. W. 370; McMakin v. McMakin, 27 Ky. Law Rep. 1211, 87 S. W. 1140; Grove v. Grove, 79 Mo. App. 142; Johns v. Johns, 80 N. J. Eq. 257, 87 A. 119; Varn v. Varn (Tex. Civ. App. 1910), 125 S. W. 639. See *contra*, Alderson v. Alderson's Guardian, 113 Ky. 830, 69 S. W. 700, 24 Ky. Law Rep. 595; Marvel v. Marvel, 163 Ky. 601, 174 S. W. 27 (effect of separation agreement).

20. Shepherd v. Shepherd, 174 Ky 615, 192 S. W. 658; Evans v. Stuart, 18 Ky. Law Rep. 941, 38 S. W. 697 (where suit is settled order may be made).

§ 1781. Financial Ability of Parties.

An allowance for counsel fees is commonly conditioned on the wife's financial inability to protect her rights without such allowance,[21] and is allowed where it appears that the wife is in need of it,[22] and where the husband has means.[23]

§ 1782. At What Stage of Proceedings Order May Be Made.

Statutes allowing the award of counsel fees pending the petition for divorce cover the period between the commencement of the action and the rendering of a final judgment.[24]

21. Rast v. Rast, 113 Ala. 319, 21 So. 34; Gay v. Gay, 146 Cal. 237, 79 P. 885; Harmon v. Harmon, 5 Pennewill (Del.) 152, 58 A. 1042; Day v. Day, 12 Idaho, 556, 86 P. 531; Funk v. Funk, 81 Ill. App. 540; Carter v. Carter, 140 Ky. 228, 130 S. W. 1102; Griffin v. Griffin, 173 Ky. 636, 191 S. W. 458; Harrison v. Harrison, 146 Ky. 631, 143 S. W. 40; Powell v. Lilly, 24 Ky. Law Rep. 193, 68 S. W. 123 (even where action dismissed by agreement); Donnelly v. Donnelly, 25 Ky. Law Rep. 1543, 78 S. W. 182 (though divorce improperly granted); Rumping v. Rumping, 41 Mont. 33, 108 P. 10; Smith v. Smith, 151 Mo. App. 649, 132 S. W. 312; Shearer v. Shearer (Mo. App.), 189 S. W. 592; Libbe v. Libbe, 166 Mo. App. 240, 148 S. W. 460; Hall v. Hall, 179 S. W. 738; Speiser v. Speiser, 188 Mo. App. 328, 175 S. W. 122; Rutledge v. Rutledge (Mo. App. 1909), 119 S. W. 489 (not where wife has real estate of $5,000); Bailey v. Bailey, 127 N. C. 474, 37 S. E. 502; Masey v. Masey, 68 N. Y. S. 994, 58 App. Div. 619; Hunter v. Hunter, 79 N. Y. S. 618, 78 App. Div. 631; Vaughn v. Vaughn, 85 N. Y. S. 443, 89 App. Div. 611; Smith v. Smith, 87 N. Y. S. 137, 92 App. Div. 442; Hartje v. Hartje, 39 Pa. Super. Ct. 490; McClelland v. McClelland (Tex. Civ. App. 1896), 37 S. W. 350; Pringle v. Pringle, 55 Wash. 93, 104 Pa. 135. See Hayes v. Hayes, 125 N. Y. S. 652, 141 App. Div. 35 (not for appeal of order which is not appealable). See *post*, § 1806.

22. Lake v. Lake, 87 N. E. 87, 194 N. Y. 179; Myron v. Myron, 151 N. Y. S. 671; Naylor v. Naylor, 59 Pa. Super. Ct. 547 (where husband has already provided wife with funds).

23. Jones v. Jones, 111 Ill. App. 396, 117 P. 414.

24. Wickland v. Wickland, 19 Cal. App. 559, 126 P. 507 (not in final judgment); Stockman & Hamilton v. Whitmore, 140 Ia. 378, 118 N. W. 403; Davis v. Davis, 141 Ind. 367, 40 N. E. 803; O'Neil v. O'Neil, 100 Ia. 743, 69 N. W. 523; Brasch v. Brasch, 50 Neb. 73, 69 N. W. 392 (even after wife's action dismissed); Winkemeier v. Winkemeier, 42 N. Y. S. 586, 11 App. Div. 199; Poillon v. Poillon, 78 N. Y. S. 323, 75 App. Div. 536; Herrman v. Herrman, 84 N. Y. S. 736, 88 App. Div. 76 (allowance may be made after disagreement on trial); Nauman v.

The award of counsel fees is an interlocutory matter and cannot usually be made in the final decree,[25] except that it may be made in the final decree by stipulation.[26]

Counsel fees cannot be ordered after final judgment of divorce,[27] but may be allowed on a petition for custody of children after finding.[28]

Where the husband files a cross complaint the wife may be allowed suit-money in this cross complaint.[29] Where the suit is dismissed before an allowance is made the husband is not liable for the wife's attorney's fees.[30]

A statute rendering the husband liable for his wife's attorney's fees does not apply to her appeal from a decree of divorce against her, she being no longer his wife.[31]

§ 1783. Whether Court May Make More Than One Award.

One award may exhaust the power of the court,[32] but it is also held that an order directing a husband to pay suit-money early in a case does not exhaust the power of the court on the subject, and it may make a further order later.[33]

Nauman, 26 Ohio Cir. Ct. R. 37; Carden v. Carden (Tenn. Ch. App. 1896), 37 S. W. 1022; Metler v. Metler, 32 Wash. 494, 73 P. 535.

After withdrawal from suit. Luse v. Luse, 144 Ia. 396, 122 N. W. 970.

25. Crim v. Crim, 80 Ore. 88, 155 P. 175, recalling of mandate denied Id. 1176; *contra*, Farrar v. Farrar (Cal. App.), 182 P. 989. See Jones v. Jones, 59 Ore. 308, 117 P. 414.

26. Farrar v. Farrar (Cal. App.), 182 P. 989.

27. Page v. Page, 195 N. Y. 540, 88 N. E. 1127 (by agreement order may be entered after decree); Bishop v. Bishop, 150 N. Y. S. 660, 165 App. Div. 954; Hengen v. Hengen, 85 Ore. 155, 166 P. 525; Dolby v. Dolby, 93 Wash. 350, 160 P. 950; *contra*, State v. Ellis, 50 La. Ann. 559, 23 So. 445.

28. Chambers v. Chambers, 75 Neb. 850, 106 N. W. 993.

29. Craig v. Craig, 89 Ark. 40, 117 S. W. 765.

30. Sears v. Swenson, 22 S. D. 74, 115 N. W. 519. See Seibert v. Seibert, 86 A. 535 (allowance for fees denied where suit abated due to wife's death).

31. Elliott v. Elliott, 138 Ky. 326, 127 S. W. 1008.

32. Hengen v. Hengen, 85 Ore. 155, 166 P. 525.

33. Main v. Main, 150 N. W. 590.

§ 1784. Items and Amount; Services in What Proceedings Included.

An attorney may recover costs which he paid and expenses reasonably necessary in procuring information,[34] but not for traveling expenses of non-resident attorneys.[35] Before taxing the wife's attorney's fees against the husband he should be given an opportunity to show what is a fair fee.[36]

Statutes authorizng counsel fees in divorce cases do not allow counsel fees in an independent action brought to modify a decree in a divorce suit on the ground of fraud,[37] but may include services in a proceeding to vacate a judgment in divorce,[38] and suit-money may be awarded to enable the wife to prosecute an appeal in a proper case.[39]

§ 1785. To Wife and Not to Counsel.

Counsel fees are ordered to the wife as alimony and not to the counsel,[40] and the allowance should be to the wife and not to the attorney,[41] although it may be made to the wife for the use of her attorney named.[42]

34. Clark v. Ellsworth, 104 Ia. 442, 73 N. W. 1023.

35. Clark v. Ellsworth, 104 Ia. 442, 73 N. W. 1023.

36. Schneider v. Schneider, 23 Ky. Law Rep. 1154, 64 S. W. 845. See Gordon v. United States Fidelity & Guaranty Co., 134 N. Y. S. 891, 76 Misc. 203.

37. Corder v. Speake, 37 Ore. 105, 51 P. 647.

38. Grannis v. Superior Court, 143 Cal. 630, 77 P. 647.

39. Heizer v. Heizer, 207 Ill. App. 126.

40. Farrell v. Betts & Betts (Ala. App.), 81 So. 188.

41. Kowalsky v. Kowalsky, 145 Cal. 394, 78 P. 877; Heizer v. Heizer, 207 Ill. App. 126, 127; Anderson v. Anderson, 124 Ill. App. 613; Callies v. Callies, 91 Ill. App. 305; Miles v. Miles, 102 Ill. App. 130; Werres v. Werres, 102 Ill. App. 360; Garrison v. Garrison, 150 Ind. 417, 50 N. E. 383; Bailey v. Bailey, 22 N. D. 553, 134 N. W. 747; Kellogg v. Stoddard, 84 N. Y. S. 1015, 89 App. Div. 137, reversing order (Sup.) 81 N. Y. S. 271, 40 Misc. 92; Cohn v. Howe, 156 N. Y. S. 448.

42. Berg v. Berg, 119 Ill. App. 422, modified 79 N. E. 13, 223 Ill. 209; Pike v. Pike, 123 Ill. App. 553; Blakely v. Blakely, 117 Minn. 482, 136 N. W. 3 (may be ordered paid to attorney).

§ 1786. Allowance to Husband.

A statute providing for suit-money to the wife is exclusive and prohibits the husband from such an allowance,[43] and a special statute allowing suit-money to the husband in certain cases will allow it only in such cases as specified.[44]

§ 1787. Against Husband or Co-Respondent.

Counsel fees may be ordered taxed against either the husband, if defeated, or the co-respondent, if the husband is successful.[45]

§ 1788. Whether Wife's Attorneys' Fees Are Necessaries.

Whether a wife can pledge her husband's credit for legal services depends, as in case of other necessaries, on whether the wife wilfully lived apart from the husband without his fault and thus forfeited her right to pledge his credit for necessaries, and otherwise the husband is liable for fees of her attorneys reasonably necessary for her protection,[46] but it has been held that the services of an attorney in conducting a divorce suit are not necessaries within the common-law meaning of the term for which the husband

43. State v. Templeton, 18 N. D. 525, 123 N. W. 283.

44. Eisenring v. Superior Court (Cal. App.), 168 P. 1062.

45. Hock v. Hock, 149 N. Y. S. 1027.

46. Read & Read v. Dickinson, 151 Ia. 369, 130 N. W. 160; Edelston v. Edelston, 173 Ky. 252, 190 S. W. 1083; Peaks v. Mayhew, 94 Me. 571, 48 A. 172; Hauser v. Hauser, 154 N. Y. S. 1072; Glaze v. Same, Id. 1074; Hays v. Ledman, 59 N. Y. S. 687, 28 Misc. 575; Hahn v. Rodgers, 69 N. Y. S. 926, 34 Misc. 549; Horn v. Schmalholz, 134 N. Y. S. 652, 150 App. Div. 333; Hicks v. Stewart & Templeton, 53 Tex. Civ. App. 401, 118 S. W. 206; McLean v. Randell (Tex. Civ. App. 1911), 135 S. W. 1116; Ceccato v. Deutschman, 19 Tex. Civ. App. 434, 47 S. W. 739 (where suit dismissed by collusion of husband and wife, husband is liable); Hill v. Hill (Tex. Civ. App. 1910), 125 S. W. 91; Dodd v. Hein, 26 Tex. Civ. App. 164, 62 S. W. 811. See Naumer v. Gray, 51 N. Y. S. 222, 28 App. Div. 529, 5 N. Y. Ann. Cas. 292; Hendrick v. Silver, 115 N. Y. S. 1093.

A wife unjustly sued for divorce, and without means to pay counsel fees, could employ counsel at her husband's expense. Hamilton v. Salisbury, 133 Mo. App. 718, 114 S. W. 563.

is liable,[47] and where her suit for divorce is dismissed after hearing on the merits this is conclusive that the services were not necessaries, and the husband is not liable to her attorneys.[48]

§ 1789. Order Limits Husband's Liability.

The order for counsel fees fixes the limit of the husband's liability,[49] and a husband who has complied with an order of court as to alimony cannot be charged with attorney's fees in addition.[50]

§ 1790. Wife's Liability.

A married woman may be liable to her attorney on her express promise to pay him,[51] and the fact that the wife has been granted an allowance for attorney's fees does not prevent the attorney from recovering a fair fee from the wife.[52]

The allowance from the court is simply a relief to that extent for the wife, and the attorney does not by obtaining it bar himself from a fair fee under his contract with the wife.[53]

§ 1791. Contract to Pay Contingent Fee Void.

An agreement by a libellant to pay her counsel a certain proportion of the amount awarded as alimony is invalid as against public policy, which is interested in maintaining the family relation, and

47. Yeiser v. Lowe, 50 Neb. 310, 69 N. W. 847; *contra*, Kellogg v. Stoddard, 81 N. Y. S. 271, 4 Misc. 92, order reversed 84 N. Y. S. 1015, 89 App. Div. 137 (attorney's fees to wife recovered against husband as "necessaries").

48. Stockman & Hamilton v. Whitmore, 140 Ia. 378, 118 N. W. 403.

49. Turner v. Woolworth, 221 N. Y. 425, 117 N. E. 814, 151 N. Y. S. 93, 165 App. Div. 70, 137 N. Y. S. 1071, 153 App. Div. 293.

50. Sherer v. Price, 3 Ohio Cir. Ct. R. 107, 2 O. C. D. 61.

51. *A wife is not liable* for fees of an attorney employed to defend a divorce suit against her, which was dismissed, if she was without means and it was agreed that he should look to her alimony for compensation. Hamilton v. Salisbury, 133 Mo. App. 718, 114 S. W. 563; Humphries v. Cooper, 55 Wash. 376, 104 P. 606; State v. Superior Court of King County, 107 P. 876; Peck v. Marling's Adm'r, 22 W. Va. 708.

52. Culley v. Badgley (Mich.), 163 N. W. 33, L. R. A. 1917F, 359.

53. Culley v. Badgley (Mich.), 163 N. W. 33, L. R. A. 1917F, 359.

where differences arise which threaten a disruption, public welfare and the good of society demand a reconciliation if practical or possible; and for these reasons a contract which tends to prevent such a reconciliation is void. Therefore it is proper, even in cases where such a contract is made, for the court to allow counsel fees in the decree.[54]

§ 1792. Separate Action for Attorney's Fees.

In some States the husband's liability for his wife's attorney's fees is ancillary to the divorce action and cannot be recovered separately,[55] while in others it is not ancillary and can be recovered separately.[56]

§ 1793. Enforcing Payment by Delaying Decree.

The fact that attorney's fees were not paid as agreed on is not cause for delay in entering final decree.[57]

§ 1794. Effect of Reconciliation of Parties.

Where parties have been reconciled after the entry of an order

54. Brindley v. Brindley, 121 Ala. 429, 25 So. 751; McConnell v. McConnell (Ark.), 136 S. W. 931, 33 L. R. A. (N. S.) 1074; Newman v. Freitas, 129 Cal. 283, 61 P. 907, 50 L. R. A. 548; McCurdy v. Dillon, 135 Mich. 678, 98 N. W. 746; Lynde v. Lynde, 64 N. J. Eq. 736, 52 A. 694, 58 L. R. A. 471; Jordan v. Westerman, 62 Mich. 170, 28 N. W. 826; McConnell v. McConnell (Ark.), 136 S. W. 931, 33 L. R. A. (N. S.) 1074.

55. Gordon & Belsheim v. Brackey, 143 Ia. 102, 120 N. W. 83; Wick v. Beck, 153 N. W. 836, L. R. A. 1915F, 1162; Meaher v. Mitchell, 112 Me. 416, 92 A. 492, L. R. A. 1915C, 467; Hamilton v. Salisbury, 133 Mo. App. 718, 114 S. W. 563; Yeiser v. Lowe, 50 Neb. 310, 69 N. W. 847. See Earle v. Earle, 132 N. Y. S. 569, 147 App. Div. 930 (allowance refused where wife had property).

56. Cohn v. Howe, 156 N. Y. S. 448; Wood v. Wood, 62 N. Y. S. 476, 4 App. Div. 361; Ceccato v. Deutschman, 19 Tex. Civ. App. 434, 47 S. W. 739; Bord v. Stubbs, 22 Tex. Civ. App. 242, 54 S. W. 633 (if probable cause for divorce); McLean v. Randell (Tex. Civ. App. 1911), 135 S. W. 1116 (good faith of attorneys in question). See Steuer v. Hart, 162 N. Y. S. 489, 175 App. Div. 829. See Peck's v. Marling's Adm'r, 22 W. Va. 708.

57. Kellogg v. Kellogg, 166 N. Y. S. 417. See *post*, § 1857.

for counsel fees they have no right by dismissing their counsel to avoid liability, but the order fixes the counsel's right to fees.[58]

Furthermore, it is usually held that the courts have the right to allow counsel fees *pendente lite* even after the parties have become reconciled with each other. The courts take the view that it is just as much the duty of the courts to compel honesty and fair dealing on the part of a man who has had trouble with his wife as it is to promote a peaceful adjustment of his marital difficulties.[59] The statutory power given to allow counsel fees *pendente lite* means at any time before the entry of the final decree,[60] and the fact that since the services were rendered the parties have become reconciled is not a legal equivalent of a dismissal of the case, and does not deprive the court of jurisdiction to make an order for counsel fees.[61]

The opposite view is often taken that where the parties to a divorce suit have been reconciled and are living together, and the plaintiff directs her attorneys to dismiss the suit, it should be dismissed, and will not be held open for the purpose of awarding counsel fees to the plaintiff's attorneys. Public policy requires the settlement of divorce litigation as speedily as possible, and that the parties should not be forced to display the family skeleton and parade their forgiven grievances so as to aid the judge to determine what counsel fees should be awarded. Counsel in such case have ample remedy in suit in the usual way.[62] So a divorce suit should not be continued after reconciliation between the par-

58. Yoder v. Yoder (Wash.), 178 P. 474.

59. Sprayberry v. Merk, 30 Ga. 81, 76 Am. Dec. 637; Davis v. Davis, 141 Ind. 367, 40 N. E. 803; Fullhart v. Fullhart, 109 Mo. App. 705, 83 S. W. 541; Kiddle v. Kiddle (Neb.), 133 N. W. 181, 36 L. R. A. (N. S.) 1001; Sumner v. Sumner, 54 Wis. 642, 12 N. W. 21; *contra*, Lacey v. Lacey, 108 Cal. 45, 40 P. 1056; McCarthy v. McCarthy, 137 N. Y. 500, 33 N. E. 550; McCulloch v. Murphy, 45 Ill. 256.

60. Kiddle v. Kiddle (Neb.), 133 N. W. 181, 36 L. R. A. (N. S.) 1001.

61. Beaulieu v. Beaulieu, 114 Minn. 511, 131 N. W. 481.

62. Reynolds v. Reynolds, 67 Cal. 176, 7 P. 480; Keefer v. Keefer (Ga.), 78 S. E. 462, 46 L. R. A. (N. S.) 527; Jordan v. Westerman, 62 Mich. 170, 28 N. W. 826, 4 Am. St. R. 836; Hill-

ties merely to allow the attorney's fees to be taxed.[63] Also a reconciliation puts an end to a petition for separation and gives the attorney a right to sue for his fees.[64]

man v. Hillman, 42 Wash. 595, 85 P. 61, 114 Am. St. R. 135.

63. Szymanski v. Szymanski, 151 Wis. 145, 138 N. W. 53. See Womacks v. Womacks, 125 Ill. App. 441.

64. Naumer v. Gray, 58 N. Y. S. 476, 41 App. Div. 361.

CHAPTER XXXIII.

PERMANENT ALIMONY.

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§ 1795. In General.

Where nullity is pronounced, or no marriage, or, upon a wife's petition for divorce, she is found in fault and the result of the whole litigation is to grant a divorce to her husband instead, she is not entitled to permanent alimony; for such alimony is not for guilty wives, nor for those who are not properly wives at all.[65] Permanent alimony varies according to the offence; the means and prospects of the husband; what he received through marriage from his wife; the wife's comparative means and separate property, and like circumstances. A gross sum is sometimes adjudged to a divorced woman as her permanent alimony, especially where vexa-

65. Shafer v. Shafer, 10 Neb. 468; Everett v. Everett, 52 Cal. 383. Such alimony is not allowed upon a decree for nullity, independently of statutes conferring the right.

tious delay is feared.[66] More often it is fixed at a certain defined proportion, usually from one-third to one-half of the increase and income of his property and means of support, and made payable by periodical sums.[67] But the rule is not rigid, and regards what is reasonable and just from all the circumstances of the case.[68]

§ 1796. Defined.

Alimony has been defined as an allowance to the wife on account of her living apart from her husband without her fault, to take the place of the legal obligation of the husband to support her.[69]

§ 1797. Dependent on Statute.

Alimony can be granted only as authorized by statute.[70]

66. Semrow v. Semrow, 23 Minn. 214; Hamilton v. Hamilton, 37 Mich. 603. Alimony should not be allowed if the complainant is brought within no recognized equity. Lapp v. Lapp, 43 Mich. 287. To give all the husband's property as alimony to the wife is unwarranted. Ross v. Ross, 78 Ill. 402. But penalty added to the periodical payments, on default, is not an abuse of discretion. Blankenship v. Blankenship, 19 Kan. 159.

67. McClung v. McClung, 40 Mich. 493.

68. Mytton v. Mytton, 3 Hag. Ec. 657; Andrews v. Andrews, 69 Ill. 609; Ressor v. Ressor, 82 Ill. 442; Gardner v. Gardner, 54 Ga. 560; Latham v. Latham, 30 Gratt. 307.

69. Rush v. Flood, 105 Ill. App. 182; Rogers v. Rogers, 46 Ind. App. 506, 89 N. E. 901; Schooley v. Schooley (Ia.), 169 N. W. 56; Day v. Day, 168 Ky. 68, 181 S. W. 937; Irwin v. Irwin, 105 Ky. 632, 49 S. W. 432, 20 Ky. Law Rep. 1761 (even though husband is granted divorce); Muir v. Muir, 28 Ky. Law Rep. 1355, 92 S. W. 314, 4 L. R. A. (N. S.) 909; Brown v. Brown, 222 Mass. 415, 111 N. E. 42; Allen v. Allen, 100 Mass. 375; Kiplinger v. Kiplinger, 172 Mich. 552, 138 N. W. 230; Bialy v. Bialy, 167 Mich. 559, 133 N. W. 496; Anderson v. Norvell-Shapleigh Hardwart Co., 134 Mo. App. 188, 113 S. W. 733; Faversham v. Faversham, 146 N. Y. S. 569, 161 App. Div. 521 (alimony is a personal and not a property right); Fickel v. Granger, 83 Ohio St. 101, 93 N. E. 527; Lape v. Lape (Ohio), 124 N. E. 51; Davis v. Davis (Okla.), 161 P. 190; Tuttle v. Tuttle, 26 S. D. 306, 128 N. W. 695; Warne v. Warne, 156 N. W. 60; Owens v. Owens, 96 Va. 191, 31 S. E. 72; Lally v. Lally, 152 Wis. 56, 138 N. W. 651.

70. Parker v. Parker, 211 Mass. 139, 97 N. E. 988; Haskell v. Haskell, 119 Minn. 484, 138 N. W. 787.

§ 1798. Dependent on Valid Marriage.

Alimony is dependent on the existence of a valid marriage.[71] So where alimony is awarded in a petition for maintenance, and the defence is that there is no marriage, an appeal stays the execution of the order for alimony, as any such payment would be an impairment *pro tanto* of the subject of the appeal, and also an invasion of the defendant's right to have his property preserved and not diminished during the contest in the court of appeal. The court, however, has jurisdiction to award alimony *pendente lite*.[72]

§ 1799. Marriage Induced by Fraud.

It is no defence to alimony that the husband was induced to marry by the promise of the wife's father to convey to him certain property, which agreement he failed to keep.[73]

§ 1800. Divorce Obtained by Fraud.

Alimony may be refused where the court is convinced at a subsequent hearing that the divorce was obtained by a perversion of the facts by the complainant.[74]

§ 1801. Award to Husband.

In the absence of a statute authorizing it a husband is not entitled to alimony from his wife,[75] but under statute a husband may be awarded alimony even when unsuccessful in his action for divorce.[76]

71. Robinson v. Robinson, 112 Miss. 224, 72 So. 923; Aldridge v. Aldridge (Miss.), 77 So. 150.

72. Robinson v. Robinson (N. J.), 92 A. 94, L. R. A. 1915B, 1071; Russell v. Russell, 156 Ia. 674, 137 N. W. 925; Anderson v. Anderson, 123 Cal. 445, 56 P. 61.

This question depends on statutes governing appeals and it seems to be commonly held that an appeal stays the execution of an order for alimony. Masterson v. Ogden, 78 Wash. 644, 139 P. 654, Ann. Cas. 1914D, 885.

73. Peckerman v. Peckerman, 154 N. Y. S. 297, 91 Misc. 114.

74. Adams v. Seibley, 115 Mich. 402, 73 N. W. 377, 4 Det. Leg. N. 912.

75. Groth v. Groth, 69 Ill. App. 68; Green v. Green, 49 Neb. 546, 68 N. W. 947, 59 Am. St. R. 560, 34 L. R. A. 110; Poloke v. Poloke, 37 Okla. 70, 130 P. 535; Hoagland v. Hoagland, 19 Utah, 103, 57 P. 20; Brenger v. Brenger, 142 Wis. 26, 125 N. W. 109.

76. Albert v. Albert, 7 Ohio App. 156.

§ 1802. Effect of Dismissal of Libel.

Alimony will not usually be allowed to a wife whose separation petition is denied on account of her fault,[77] or to a wife on being refused a divorce,[78] but she may be entitled to alimony although her petition is denied where she is not at fault.[79] A dismissal by the husband of his bill for divorce does not deprive the court of the power to render a judgment against him for alimony.[80]

§ 1803. Fault of Parties.[81]

The award of alimony depends on the equities of each case[82]

77. (1911) Robinson v. Robinson, 131 N. Y. S. 260, 146 App. Div. 533, reversing decree (1910) 125 N. Y. S. 1064, 69 Misc. 438.

78. Johnson v. Johnson, 57 Kan. 343, 46 P. 700; Nichols v. Nichols, 169 Mich. 540, 135 N. W. 328; Kamman v. Kamman, 152 N. Y. S. 579, 167 App. Div. 423, modifying judgment (Sup.) 151 N. Y. S. 226; Curnen v. Curnen, 140 N. Y. S. 805, 155 App. Div. 536; Hengen v. Hengen, 85 Ore. 155, 166 P. 525; Van Gelder v. Van Gelder, 61 Wash. 146, 112 P. 86. See Bensen v. Bensen, 20 Cal. App. 462, 129 P. 596.

Where a wife provokes her husband to strike her and use abusive language, amounting to cruel and inhuman treatment if unprovoked, and for that reason is denied a separation, the court will direct the husband to support her by a proper allowance. Robinson v. Robinson, 125 N. Y. S. 1064, 69 Misc. 438.

79. Hartshorn v. Hartshorn (Okla.), 168 P. 822.

80. O'Neil v. O'Neil, 100 Ia. 743, 69 N. W. 523; Woodward v. Woodward, 84 Mo. App. 328; Schultz v. Schultz, 128 Wis. 28, 107 N. W. 302.

81. See *ante*, § 1769.

82. Neander v. Neander, 35 Colo. 495, 84 P. 69; Hughes v. Hughes, 162 Ky. 505, 172 S. W. 960 (where wife entitled to decree though action brought by husband); Green v. Green, 152 Ky. 486, 153 S. W. 775 (though wife not free from blame); Shepherd v. Shepherd, 174 Ky. 615, 192 S. W. 658; McAllen v. McAllen, 97 Minn. 76, 106 N. W. 100 (alimony denied where asked for in place of void contract); Abele v. Abele, 62 N. J. Eq. 644, 50 A. 686 (denied where wife able to support herself); Kamman v. Kamman, 151 N. Y. S. 226, judgment modified 152 N. Y. S. 579, 167 App. Div. 423; Douglas v. Douglas (N. Y. Sup. 1875), 5 Hun, 140; De Witt v. De Witt, 67 Ohio St. 340, 66 N. E. 136; *In re* Cave, 26 Wash. 213, 66 P. 425, 90 Am. St. R. 736; Spute v. Spute, 74 Wash. 665, 134 P. 175.

Where wife was entitled to a divorce, she was entitled to an allowance for alimony. Dunn v. Dunn, 150 Mich. 476, 14 Det. Leg. N. 767, 114 N. W. 385.

The general rule is that the income of the husband, whether derived or to

and should be awarded where the wife has been cruelly treated,[83] and where divorce is granted to the wife the court may be under a duty to award alimony.[84] It may be awarded where the husband abandons his wife although the wife is not free from fault,[85] or may by statute be allowed on the sole ground of living apart for a certain number of years.[86]

The failure of a wife to obey a decree that she should allow the husband certain rights with regard to the children does not excuse him from paying alimony.[87]

It is the general rule that permanent alimony will not be granted unless the husband is guilty,[88] or to a wife whose conduct was the sole cause of the separation,[89] or where the wife is living apart from the husband without reasonable cause.[90]

A wife having obtained a limited divorce from bed and board is still under the obligation of chastity, and alimony is conditional on the performance of that obligation.[91]

be derived from his personal exertions, or from permanent property, or from both, is the fund from which alimony is derived, and from which there should be a personal decree, the amount to be determined by the circumstances of each particular case. Reynolds v. Reynolds, 68 W. Va. 15, 69 S. E. 381.

83. Griffin v. Griffin, 154 Ky. 766, 159 S. W. 597.

84. Mundstock v. Mundstock, 203 Ill. App. 302.

85. Kelly v. Kelly (Ky.), 209 S. W. 335.

86. Johnson v. Johnson (Ky.), 209 S. W. 385.

87. Schweig v. Schweig, 107 N. Y. S. 905, 122 App. Div. 787.

88. Volkmar v. Volkmar, 147 Cal. 175, 81 P. 413; Ahrns v. Ahrns, 160 Ky. 342, 169 S. W. 720 (where wife goads husband into acts of cruelty to obtain separation and alimony it will be denied); Garrison v. Garrison, 31 Ky. Law Rep. 1209, 104 S. W. 980; Smith v. Smith, 27 Ky. Law Rep. 776, 86 S. W. 678; House v. House, 102 Va. 235, 46 S. E. 299 (not where ill-treatment was provoked by wife); Martin v. Martin, 3 W. Va. 695, 11 S. E. 299. See Thompson v. Thompson, 27 Ky. Law Rep. 516, 85 S. W. 730.

89. Axton v. Axton (Ky.), 206 S. W. 480.

90. Davis v. Davis (Okla.), 161 P. 190.

91. G—— v. G——, 67 N. J. Eq. 30, 56 A. 736.

Condonation. An independent suit for alimony may be maintained, and where a decree for divorce is denied because of condonation, alimony may be awarded to the wife for her maintenance, where the husband

§ 1804. Impotency.

Alimony will be allowed only where the husband has been guilty of a matrimonial offence and impotency is not such an offence,[92] and impotency of the wife is not her fault and alimony should be awarded where necessary for her proper support.[93]

§ 1805. Where Husband Is Granted a Divorce.

It is the general rule that no alimony will be awarded where the husband is granted a divorce,[94] but alimony may be awarded in the discretion of the court although divorce is given him for her fault.[95]

refuses to support her. Shirey v. Shirey, 87 Ark. 175, 112 S. W. 369.

92. G—— v. G——, 67 N. J. Eq. 30, 56 A. 736.

93. Moss v. Moss (Ga.), 93 S. E. 875; Knestrick v. Knestrick, 1 Ohio App. 285, 34 Ohio Cir. Ct. R. 195. See Mutter v. Mutter, 123 Ky. 754, 97 S. W. 393, 30 Ky. Law Rep. 76 (where wife concealed her impotency and thus induced marriage she is at fault and no alimony should be ordered).

94. Lampson v. Lampson, 171 Cal. 332, 153 P. 238; Phinney v. Phinney (Fla.), 82 So. 357; Becklenberg v. Becklenberg, 102 Ill. App. 504; Holman v. Holman, 155 Ky. 493, 159 S. W. 937; Phelps v. Phelps, 176 Ky. 456, 195 S. W. 779; Caudill v. Caudill, 172 Ky. 460, 189 S. W. 431; Robards v. Robards, 33 Ky. Law Rep. 565, 110 S. W. 422 (adultery); Gains v. Gains, 26 Ky. Law Rep. 471, 19 S. W. 929; Springer v. Springer, 21 Ky. Law Rep. 1292, 54 S. W. 710; Cotrell v. Cotrell, 24 Ky. Law Rep. 2417, 74 S. W. 227; Henry v. Henry, 25 Ky. Law Rep. 596, 76 S. W. 130; Dollins v. Dollins, 26 Ky. Law Rep. 1036, 83 S. W. 95; Motley v. Motley, 93 Mo. App. 473, 67 S. W. 741; Elliott v. Elliott, 135 Mo. App. 42, 115 S. W. 486; Slaughter v. Slaughter, 106 Mo. App. 104, 80 S. W. 3; Cole v. Cole, 115 Mo. App. 466, 91 S. W. 457; Isaacs v. Isaacs, 71 Neb. 537, 99 N. W. 268.

95. Vigil v. Vigil, 49 Colo. 156, 111 P. 833; Harris v. Harris, 31 Grat. 13 (only in peculiar case where guilty wife remarries); Stacker v. Stacker, 117 Ill. App. 549; Fites v. Fites, 62 Ind. App. 396, 112 N. E. 39 (where wife's industry had contributed to husband's estate); McDonald v. McDonald, 117 Ia. 307, 90 N. W. 603; Laird v. Laird, 87 Kan. 111, 123 P. 869; Pore v. Pore, 20 Ky. Law Rep. 1980, 50 S. W. 681; Alderson v. Alderson's Guardian, 113 Ky. 830, 69 S. W. 700, 24 Ky. Law Rep. 595; Masterton v. Masterton, 20 Ky. Law Rep. 631, 46 S. W. 20; Lofvander v. Lofvander, 146 Mich. 370, 109 N. W. 662, 13 Det. Leg. N. 793 (cruelty); Winkler v. Winkler, 104 Miss. 1, 61 So. 1; Stark v. Stark, 115 Mo. App. 436, 91 S. W. 413 (regardless of value of separate estate of wife); Pederson v. Pederson, 88 Neb. 55, 128 N. W. 649 (for any ground except adultery

Alimony should be ordered even where the husband is granted a divorce where the wife is less at fault and is ill and left penniless by the divorce.[96]

§ 1806. Property of Parties.[97]

Alimony may depend on the financial condition of the parties and the necessities of the wife,[98] and will not usually be ordered where the wife has an income sufficient for her support and larger than that of the husband.[99] Alimony may be denied where the husband's means are slight,[1] although it may be awarded even though the husband has no separate or community property from which payment may be enforced,[2] but has earning capacity,[3] and

of wife); Ecker v. Ecker, 22 Okla. 873, 98 P. 918; Pauly v. Pauly, 14 Okla. 1, 76 P. 148 (adultery of wife); Miller v. Miller, 65 Ore. 551, 133 P. 86, modifying opinion on rehearing 65 Ore. 551, 131 P. 308; *contra*, Motley v. Motley, 93 Mo. App. 473, 67 S. W. 741; De Hoog v. De Hoog, 65 Mo. App. 246.

Where a libel in divorce by a husband charges both desertion and barbarous treatment, and a jury finds for the libelant on both charges, the court cannot make an order for permanent alimony to the wife under Act May 8, 1854 (P. L. 644), and Act June 25, 1895 (P. L. 308), providing that, where a wife by barbarous treatment renders the condition of the husband intolerable, the court may, in case of divorce on the application of the husband, grant alimony. Parker v. Parker, 35 Pa. Super. Ct. 341.

Under Civ. Code 1895, § 2435, providing that in all suits for divorce a jury may give permanent alimony to the wife, though a husband may obtain a divorce from his wife on the ground of wilful desertion for more than three years before the filing of the suit, it is not an inflexible rule of law that the wife shall not be allowed alimony; but it does not follow that the divorced wife would be entitled to alimony as of course where her conduct has caused her husband to obtain a total divorce from her. Davis v. Davis, 134 Ga. 804, 68 S. E. 594.

See Pemberton v. Pemberton, 169 Ky. 476, 184 S. W. 378.

96. Burton v. Burton (Ky.), 211 S. W. 869.

97. See *ante*, § 1781; *post*, 1819.

98. Pedersen v. Pedersen, 88 Neb. 55, 128 N. W. 649. See Morgan v. Morgan, 102 Ark. 679, 143 S. W. 584.

99. Wilkins v. Wilkins, 84 Neb. 206, 120 N. W. 907.

1. Bean v. Bean, 164 Ky. 810, 176 S. W. 181; Bocage v. Lombard (La.), 81 So. 604.

2. Gaston v. Gaston, 114 Cal. 542, 46 P. 609, 55 Am. St. R. 86.

3. Johnson v. Johnson, 131 Ga. 606, 62 S. E. 1044.

may be ordered even though the husband has no property and cannot work, if it appears that he has conveyed his property with intent to avoid alimony.[4]

§ 1807. Allowed Only in Divorce Decree.

Permanent alimony will be allowed in a decree for absolute divorce in a proper case,[5] but usually alimony cannot be allowed on proceedings begun after the decree in divorce where the decree makes no provision for it.[6]

Where the question of alimony is raised by the pleadings the failure of the court to pass upon it is a judicial error, and hence the decree cannot be amended,[7] as if the wife asked alimony in the original action, and none is awarded, the effect of it is the same as if the decree had expressly denied it, and it is an adjudication binding upon the parties.[8] An absolute decree of divorce may not be amended by adding to it an award of alimony. At common law and under ecclesiastical procedure courts did entertain such an action, but this was because there was no such thing as an absolute divorce known to either law. The divorce was from bed and board and was little more than legalized separation, and the duty of the husband to support the wife continued after the divorce was

4. McAtee v. McAtee, 116 Ill. App. 511.

5. Alexander v. Alexander, 13 App. D. C. 334; Griffin v. Griffin, 173 Ky. 636, 191 S. W. 458; Boreing v. Boreing, 114 Ky. 522, 71 S. W. 431, 24 Ky. Law Rep. 1288; Muir v. Muir, 28 Ky. Law Rep. 1355, 92 S. W. 314, 4 L. R. A. (N. S.) 909 (although husband has not a fee simple estate); Sodini v. Sodini, 96 Minn. 329, 104 N. W. 976; *contra*, Duffy v. Duffy, 120 N. C. 346, 27 S. E. 28.

6. Hall v. Hall, 141 Ga. 361, 80 S. E. 992; Hazard v. Hazard, 197 Ill. App. 612; Johnson v. Matthews, 124 Ia. 255, 99 N. W. 1064; Spain v. Spain, 177 Ia. 249, 158 N. W. 529; Jackson v. Burns, 116 La. 695, 41 So. 40; Moross v. Moross, 129 Mich. 27, 87 N. W. 1035, 8 Det. Leg. N. 825; Doyle v. Doyle, 26 Mo. 545; Koehl v. Koehl, 156 N. Y. S. 234, 92 Misc. 579; Moore v. Moore, 64 Pa. Super. Ct. 192. See, however, Alderson v. Alderson's Guardian, 113 Ky. 830, 69 S. W. 700, 24 Ky. Law Rep. 595.

7. O'Brien v. O'Brien, 124 Cal. 422, 57 P. 225.

8. Spain v. Spain (Ia.), 158 N. W. 529, L. R. A. 1917D, 319.

granted, and these courts recognized the right to enforce this obligation by changing the original decree or order to meet new conditions. But the modern divorce decree is an adjudication binding upon the parties, and it cannot be modified by awarding alimony. The fact that the statute provides that subsequent changes may be made in the allowance for alimony does not give the court jurisdiction, as there is here nothing to modify. The wife relinquished her right to alimony when she failed to have it awarded in the original decree.[9] Alimony may, however, be allowed after a decree *nisi*,[10] or after a void decree,[11] or after decree where in the decree the question of alimony is reserved.[12] Where a decree which makes no provision for alimony is reopened for fraud of the petitioner in obtaining it, the court should not allow alimony in a new decree.[13]

By statute, however, in some States alimony may be awarded after decree for divorce although the petition and decree are silent on the subject,[14] but even under a statute authorizing the court to modify its allowance of alimony the court may be powerless to order alimony later where none is provided in the original decree.[15]

9. Spain v. Spain (Ia.), 158 N. W. 529, L. R. A. 1917D, 319.

Inadvertence of counsel. It has been held, however, that the court may permit an amendment to a decree for divorce permitting alimony where the failure to ask for it was due to inadvertence of petitioner's counsel; Lynde v. Lynde, 58 N. Y. S. 567, 41 App. Div. 280, judgment affirmed 162 N. Y. S. 405, 56 N. E. 979, 48 L. R. A. 679, 21 S. Ct. 555, 181 U. S. 183, 45 L. Ed 810.

10. Brigham v. Brigham, 147 Mass. 159, 16 N. E. 780.

11. Cizek v. Cizek, 76 Neb. 797, 107 N. W. 1012.

12. *Ex parte* O'Brien, 116 Cal. xvi., 48 P. 71; Starrett v. Starrett, 132 Ill. App. 314 (from property acquired by husband after divorce); Hauscheld v. Hauscheld, 53 N. Y. S. 831, 33 App. Div. 296, order affirmed, 159 N. Y. 570, 54 N. E. 1094.

13. Cole v. Cole, 144 Mich. 346, 108 N. W. 74, 13 Det. Leg. N. 260 (such order is not void, however). See Cralle v. Cralle, 79 Va. 182; Metler v. Metler, 32 Wash. 494, 73 P. 535 (where court had no jurisdiction to reopen a divorce decree its subsequent order for alimony is void).

14. Smith v. Smith (N. J.), 102 A. 381; McKensey v. McKensey, 65 N. J. Eq. 633, 55 A. 1073; Phillips v. Phillips (R. I.), 97 A. 593; Adams v. Abbott, 21 Wash. 29, 56 P. 931.

15. Swallow v. Swallow, 84 N. J.

§ 1808. Wife Not Bound Where She Has No Notice of Divorce.

Where a divorce is granted to the husabnd in a suit of which no service or notice on the wife was had, this does not affect her rights to alimony.[16]

§ 1809. Separation by Consent.

The husband is not bound to support the wife where they mutually agree to live separate, and hence no alimony should be awarded in such case.[17]

§ 1810. Agreement of Parties.

Alimony is incidental to matrimonial procedure, and usually requires the court's intervention. And it is accordingly held that an agreement not thus sanctioned between husband and wife pending a suit, that the one shall pay a certain sum as alimony to the other, is purely voluntary and unenforceable by the wife.[18] But arrangements through a trustee, pending a divorce suit, may be sustained as furnishing a fair equivalent for temporary alimony.[19] *Bona fide* and fair settlements relative to permanent alimony, too, are permitted to stand against the opposition of third persons and the wife's solicitor himself.[20]

Agreements for money payment, or notes to the use of the wife through a third party, in consideration of her condonation and a dismissal of her divorce suit, being favorable to marriage, have been upheld.[21] All arrangements between spouses in the position

Eq. 411, 93 A. 885 (although wife ignorant of the omission); McFarlane v. McFarlane, 43 Ore. 477, 73 P. 203; Cody v. Cody, 154 P. 952; Bassett v. Bassett, 99 Wis. 344, 74 N. W. 780.

16. Barberton Savings Bank Co. v. Belford, 32 Ohio Cir. Ct. R. 574.

17. Mayr v. Mayr, 161 Cal. 134, 118 P. 546. See, however, Simpkins v. Simpkins (Ark.), 207 S. W. 28.

18. Moon v. Baum, 58 Ind. 194. See *post*, § 1815.

19. McLaren v. McLaren, 33 Ga. (Suppl.) 99.

20. Gregory v. Gregory, 32 N. J. Eq. 424.

21. Phillips v. Meyers, 82 Ill. 67; Adams v. Adams, 31 N. Y. Supr. 401. See also, as between husband and wife, Reithmaier v. Beckwith, 35 Mich. 110; Burnett v. Paine, 62 Me.

of parties to a divorce suit are, however, to be investigated jealously; and their contract, if unequal, or tending to facilitate a final divorce between them, can hardly be deemed otherwise than contrary to public policy and good morals.[22]

Thus an agreement is void as against public policy which undertakes that the wife will not attack a decree of divorce obtained against her by fraud in consideration that he pays her certain sums for support. The agreement requires the suppression of evidence of collusion and fraud practiced on a court of justice.[23]

Although any agreement between the parties to a divorce to influence the decision of the court by concealment or misrepresentation is collusive and void, and every agreement made between the parties to a divorce action concerning property rights or alimony is carefully scrutinized by the court, still a fair agreement between the parties for a payment or division of property made without collusion as to the procuring of the divorce is not opposed to, but is in aid of the orderly and just determination by the court of the questions involved in the action. The obligation on the part of the husband to contribute from his property or earnings to the future support of his wife after a divorce is so well defined and understood that it is a proper subject of negotiation between the parties. So such an agreement made fairly after the court had announced that it was about to grant the wife a divorce will be sustained.[24]

Alimony may be thus fixed by a fair agreement of parties,[25] and

122. But as to enforcing such contracts, see Van Order v. Van Order, 15 N. Y. Supr. 315; Brown v. Brine, 1 Ex. D. 5.

22. Moon v. Baum, 58 Ind. 194; Muckenburg v. Holler, 29 Ind. 139; Stoutenburg v. Lybrand, 13 Ohio St. 228.

23. White v. Winter, 46 App. D. C. 355, L. R. A. 1917F, 618.

24. Nelson v. Vassenden (Minn.), 131 N. W. 794, 35 L. R. A. (N. S.) 1167.

25. Dickinson v. Dickinson, 50 Colo. 232, 114 P. 652; Collier v. Collier, 66 Ill. App. 484; Carr v. Carr (Ia.), 171 N. W. 785; Patrick v. Patrick, 30 Ky. Law Rep. 1364, 101 S. W. 328; Mesler v. Jackson Circuit Judge, 154 N. W. 63; Crenshaw v. Crenshaw (Mo.), 208 S. W. 249; Francis v. Francis, 179 S. W. 975; Burnham v.

where the agreement becomes a part of the decree it becomes as binding as any other part of the decree,[26] but such an agreement will not affect the power of the court to make or enforce its own decree.[27]

Such an agreement may remain valid although not embodied in the decree,[28] and a postnuptial contract of separation settling all property rights between the parties is a bar to alimony,[29] but not where the divorce suit was not in contemplation of the parties at the time the contract was signed, and the contract was made to settle differences as to property rights then outstanding between them.[30]

The parties may even after a decree make a binding agreement concerning the child's support and the payment of alimony different from that ordered by the court,[31] but where the property

Burnham, 162 N. Y. S. 840, 97 Misc. 199; Pye v. Pye, 152 N. Y. S. 564, 167 App. Div. 951; Lawrence v. Lawrence, 64 N. Y. S. 1113, 31 Misc. 646, reversed 66 N. Y. S. 393, 32 Misc. 503; Taylor v. Taylor, 66 N. Y. S. 561, 32 Misc. 312; Julier v. Julier, 62 Ohio St. 90, 56 N. E. 661, 78 Am. St. R. 697 (parties are estopped to claim agreement is void); Wilford v. Wilford, 94 A. 685; Connellee v. Werenskiold (Tex. Civ. App. 1905), 87 S. W. 747; Newman v. McComb, 112 Va. 408, 71 S. E. 624 (recoverable in contract).

26. Whitney v. Whitney Elevator & Warehouse Co., 183 F. 678, 106 C. C. A. 28, affirming decree (C. C.) 180 F. 187; Cavenaugh v. Cavenaugh, 106 Ill. App. 209.

27. Silverschmidt v. Silverschmidt, 112 Ill. App. 58; Walter v. Walter, 189 Ill. App. 345 (agreement must be shown to court to be fair); Nicols v. Nicols, 169 Mich. 540, 135 N. W. 328; McKnight v. McKnight, 5 Neb. (unof.) 260, 98 N. W. 62 (may award alimony in addition to that fixed in the decree); Cross v. Cross, 98 Wash. 651, 168 P. 168 (award in decree governs where decree not appealed from).

Election. Where a wife accepted payment of alimony as ordered by the judgment, which was different cepted payment of alimony as ordered by the judgment, which was different from the contract for alimony, she elected to abandon the contract, and neither she nor her executrix could thereafter enforce it. Melton v. Hubbard, 144 Ga. 18, 85 S. E. 1016.

28. Nelson v. Vassenden, 115 Minn. 1, 131 N. W. 794.

29. Gilsey v. Gilsey, 195 Mo. App. 407, 193 S. W. 858; Cain v. Cain, 177 N. Y. S. 178.

30. Mundstock v. Mundstock, 203 Ill. App. 302.

31. Dutcher v. Dutcher (Kan.), 175 P. 975.

transferred to the wife in lieu of alimony is foreclosed the agreement made does not bar further claim for alimony.[32]

§ 1811. Antenuptial Contract.

A decree of divorce terminates all property rights between the parties regardless of any antenuptial contract,[33] and an antenuptial contract by which the parties give up rights in each other's property is no bar to alimony in divorce, as such a contract does not contemplate divorce,[34] but a verbal contract will not bar the wife's dower.[35]

The wife's contract to give up her rights in her husband's property will not affect her rights in her own separate property.[36]

§ 1812. Effect of Reconciliation on Agreement.

An agreement on separation as to the wife's support is abrogated on their reconciliation.[37]

§ 1813. Effect of Prior Decree for Support.

Alimony will not be awarded where the wife has already obtained a decree for support.[38]

32. Sutton v. Sutton, 78 Ore. 9, 152 P. 271.

33. Watson v. Watson, 37 Ind. App. 548, 77 N. E. 355.

34. Carter v. Carter, 76 Vt. 190, 56 A. 989.

35. Shemwell v. Carper's Adm'r, 27 Ky. Law Rep. 997.

36. Wallace v. Mutual Ben. Life Ins. Co., 97 Minn. 27, 106 N. W. 84 (interest in insurance on life of husband).

37. Wright v. Wright, 17 Det. Leg. N. 521, 127 N. W. 328.

38. Smith v. Smith, 147 Cal. 143, 81 P. 411.

CHAPTER XXXIV.

AMOUNT OF ALIMONY.

SECTION 1814. In General.
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1826. Fact That Wife Had Supported Herself During Marriage.
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§ 1814. In General.

The amount of the alimony should depend on the circumstances of each case, including the age and health and social position of the parties, the financial condition of both and source of property, earning capacity and respective fault of the parties as appears by the divorce proceedings and the necessities of the children.[39]

39. Hogg v. Maxwell (U. S. D. C.), 233 F. 290; Farrell v. Farrell (Ala.), 71 So. 661; Johnson v. Johnson, 195 Ala. 641, 71 So. 415; Black v. Black (Ala.), 74 So. 338; Ortman v. Ortman (Ala.), 82 So. 417; Meffert v. Meffert, 177 S. W. 1; Mundstock v. Mundstock, 203 Ill. App. 302; Barginde v. Barginde, 189 Ill. App. 390; Boggs v. Boggs, 45 Ind. App. 397, 90 N. E. 1040; Stutsman v. Stutsman, 30 Ind. App. 645, 66 N. E. 908; Davison v. Davison (Ia.), 165 N. W. 44; Barr v. Barr, 157 Ia. 153, 138 N. W. 379; Arment v. Arment, 154 Ia. 573, 134 N. W. 616; Reisacker v. Reisacker (Kan.), 181 P. 549; McClintock v. McClintock, 147 Ky. 409, 144 S. W. 68; Pearson v. Pearson, 166 Ky. 9, 178 S. W. 1164; Sebastian v. Rose, 135 Ky. 197, 122 S. W. 120; Murray v. Murray, 163 Ky. 546, 174 S. W. 9; Goff v. Goff, 166 Ky. 715, 179 S. W. 826; Broyles v. Broyles, 32 Ky. Law Rep. 445, 106 S. W. 212; Johnston v. Johnston, 180 Ky. 439, 202 S. W. 869; Kelly v. Kelly (Ky.), 209 S. W. 325; Hooe v. Hooe, 122 Ky. 590, 92 S. W. 317, 29 Ky. Law Rep. 113 ($3,000 out of $13,000); Ghisalberti v. Calamari

The needs and social standing of the wife may be considered.[40]

The amount of alimony is in the discretion of the trial judge, whose award will not be disturbed unless a clear abuse of judgment is shown,[41] but a statute conferring discretion on the court means reasonable discretion and does not give him unlimited powers.[42]

§ 1815. Agreement of Parties.[43]

Alimony may be and commonly is fixed in accordance with an agreement between the parties.[44] Such agreement will be upheld,

(La.), 78 So. 751; O'Quinn v. Evans (La.), 82 So. 587; Gagneaux v. Desonier, 51 La. Ann. 1095, 25 So. 946; Wygodsky v. Wygodsky (Md.), 106 A. 698; Streicher v. Streicher (Mich.), 168 N. W. 409; Robson v. Robson, 17 Det. Leg. N. 303, 126 N. W. 216; Kiplinger v. Kiplinger, 172 Mich. 552, 138 N. W. 230; Bearinger v. Bearinger, 170 Mich. 661, 136 N. W. 1117; McDuffee v. McDuffee, 169 Mich. 410, 135 N. W. 242; Collins v. Collins, 155 N. W. 555; Smith v. Smith (Mo. App.), 193 S. W. 894; Smith v. Smith, 180 S. W. 568; Bolton v. Bolton, 94 Neb. 343, 143 N. W. 208; Metcalf v. Metcalf, 73 Neb. 79, 102 N. W. 79 (contribution of wife to estate); Nathan v. Nathan (Neb.), 165 N. W. 955; Zimmerman v. Zimmerman, 59 Neb. 80, 80 N. W. 643; Boyle v. Boyle, 75 N. J. Eq. 293, 72 A. 1118; Boyle v. Boyle (N. J. Ch. 1907), 67 A. 690; Deitrick v. Deitrick, 88 N. J. Eq. 560, 103 A. 242; Weigand v. Weigand, 92 N. Y. S. 679, 103 App. Div. 42, 34 Civ. Proc. R. 186; Derritt v. Derritt (Okla.), 168 P. 455 (having regard to value of husband's property); Ahrens v. Ahrens (Okla.), 169 P. 486; Vick v. Vick, 45 Okla. 411, 145 P. 815; Belcher v. Belcher (Tenn. Ch. App. 1900), 57 S. W. 382; Read v. Read, 28 Utah, 297, 78 P. 675; Bailey v. Bailey, 76 Vt. 26, 56 A. 1014, 104 Am. St. R. 935 (pension may be considered); Taylor v. Taylor, 59 Wash. 306, 109 P. 1019; Gibson v. Gibson, 67 Wash. 474, 122 P. 15; McCaughey v. McCaughey, 160 Wis. 287, 151 N. W. 812; Swanson v. Swanson, 152 N. W. 452.

40. Shirey v. Shirey, 87 Ark. 175, 112 S. W. 369; Harrison v. Harrison, 146 Ky. 631, 143 S. W. 40; Anderson v. Anderson, 152 Ky. 773, 154 S. W. 1; Brokaw v. Brokaw, 123 N. Y. S. 17, 66 Misc. 307; Herrett v. Herrett, 80 Wash. 474, 141 P. 1158; Henrie v. Henrie, 71 W. Va. 131, 76 S. E. 837; Reynolds v. Reynolds, 72 W. Va. 349, 78 S. E. 360.

41. Van Gorder v. Van Gorder (Colo.), 129 P. 226, 44 L. R. A. (N. S.) 998.

42. Rudasill v. Rudasill (Tex. Civ. App.), 206 S. W. 983.

43. See *ante*, § 1810.

44. Newell v. Newell, 28 Cal. App. 784, 154 P. 32; Emerson v. Emerson, 120 Md. 584, 87 A. 1033; Archbell v. Archbell, 158 N. C. 408, 74 S. E. 327; Lake v. Lake, 119 N. Y. S. 686, 136

however, only if fair to both parties, and an agreement made on separation of husband and wife, whereby the wife was given $500 in full settlement of her interests in his estate, will be set aside where he is worth over $15,000 and she is penniless and acted without advice of counsel.[45]

§ 1816. Award of Lump Sum or Periodical Payments.

The award of a lump sum in place of periodical payments may often be made,[46] dependent on the husband's financial ability,[47] or periodical payments may be awarded.[48]

App. Div. 47 (though agreement was void); Tower v. Tower, 119 N. Y. S. 506, 134 App. Div. 670 (although agreement void). See Pryor v. Pryor, 88 Ark. 302, 114 S. W. 700 (court is not bound by agreement of parties).

45. McConnell v. McConnell (Ark.), 136 S. W. 931, 33 L. R. A. (N. S.) 1074.

46. Huelmantel v. Huelmantel, 124 Cal. 583, 57 P. 582; Martin v. Martin, 195 Ill. App. 32; Griswold v. Griswold, 111 Ill. App. 269; Marsh v. Marsh, 162 Ind. 210, 70 N. E. 154 (must be sum in gross); McQueary v. McQueary (Ky.), 205 S. W. 769; Gooding v. Gooding, 104 Ky. 755, 47 S. W. 1090, 48 S. W. 432, 20 Ky. Law Rep. 955; Irwin v. Irwin, 107 Ky. 24, 52 S. W. 927, 21 Ky. Law Rep. 622; Jackson v. Burns, 116 La. 695, 41 So. 40; Brown v. Brown, 222 Mass. 415, 111 N. E. 42; Hamilton v. Hamilton, 37 Mich. 603; Ferguson v. Ferguson, 145 Mich. 290, 108 N. W. 682, 13 Det. Leg. N. 453; Longbotham v. Longbotham, 119 Minn. 139, 137 N. W. 387; Aylor v. Aylor (Mo.), 186 S. W. 1068; De Roche v. De Roche, 12 N. D. 17, 94 N. W. 767; Baker v. Baker, 2 Ohio App. 321, 34 Ohio Cir. Ct. R. 376; Hengen v. Hengen, 85 Ore. 155, 166 P. 525; Drake v. Drake, 27 S. D. 329, 131 N. W. 294 (where defendant refused to support wife pending action); Winslow v. Winslow, 182 S. W. 241; Hooper v. Hooper, 102 Wis. 598, 78 N. W. 753, 44 L. R. A. 725.

Prior allowance merged. Decree in divorce suit awarding lump sum as alimony will be presumed as intended to merge any previous *pendente lite* allowance. Pearson v. Pearson, 166 Ky. 91, 178 S. W. 1164.

Where the situation of the parties is such that the amount of alimony cannot be placed at a lump sum without danger that it may prove unjust to one of the parties, periodical payments should be ordered. Hays v. Hays, 75 Neb. 728, 106 N. W. 773.

47. Stepp v. Stepp, 178 Ky. 337, 198 S. W. 935; Green v. Green, 152 Ky. 486, 153 S. W. 775; Stanton v. Stanton (Mich.), 163 N. W. 873; Lemp v. Lemp, 249 Mo. 295, 155 S. W. 1057; Wright v. Wright, 179 S. W. 950; Boxa v. Boxa, 92 Neb. 78, 137 N. W. 986.

48. Cotter v. Cotter, 225 F. 471, 139 C. C. A. 453; Doerle v. Doerle, 159

Where the complaint asks for a certain sum this is satisfied where monthly payments equal that sum.[49]

Where a divorce is denied a wife because of condonation periodical payments should be awarded subject to modification on change of circumstances.[50]

Where the wife is credulous and easily imposed upon she should be given a monthly allowance rather than a lump sum.[51]

§ 1817. Award of Specific Property.

Alimony can usually only be ordered in money,[52] but in some cases specific property will be awarded to the wife.[53] Land is sometimes set off for permanent alimony, or a lien upon it decreed as security.[54]

§ 1818. Fault of Parties.

Where the wife has been deserted the allowance should be liberal,[55] and may be small where the wife is somewhat at fault herself.[56]

N. Y. S. 637, 96 Misc. (policy in favor of periodical payments); Adams v. Adams, 30 Okla. 327, 120 P. 566.

49. Prewitt v. Prewitt, 56 Colo. 174, 139 P. 1.

50. Shirey v. Shirey, 87 Ark. 175, 112 S. W. 369.

51. Young v. Young (Mich.), 162 N. W. 993.

52. Rice v. Rice, 6 Ind. 100; Caskey v. Caskey, 4 Ky. Law Rep. (abstract) 726; Aylor v. Aylor (Mo.), 186 S. W. 1068; Fisher v. Fisher (Mo. App.), 207 S. W. 261.

53. Longbotham v. Longbotham, 119 Minn. 139, 137 N. W. 387; Derritt v. Derritt (Okla.), 168 P. 455; Belcher v. Belcher (Tenn. Ch. App. 1900), 57 S. W. 382 (homestead to wife where husband at fault); Ramsdell v. Ramsdell, 47 Wash. 444, 92 P. 278; Reynolds v. Reynolds, 68 W. Va. 15, 69 S. E. 381 (only under special circumstances); *contra,* Ecker v. Ecker, 22 Okla. 873, 98 P. 918.

54. McClung v. McClung, 42 Mich. 53; Draper v. Draper, 68 Ill. 17; Gallagher v. Fleury, 36 Ohio St. 590; Blankenship v. Blankenship, 19 Kan. 159; Wiggin v. Smith, 54 N. H. 213. Rights of intervening parties must be respected in decreeing a lien. Daniels v. Lindley, 44 Ia. 567.

55. Thompson v. Thompson, 155 Ky. 608, 159 S. W. 1166.

56. Vigil v. Vigil, 49 Colo. 156, 111 P. 833; Conner v. Conner, 29 Ind. 48; Coon v. Coon, 26 Ind. 189; Rosenberger v. Rosenberger, 150 Ky. 803, 150 S. W. 1023; Cummings v. Cummings, 50 Mich. 305, 15 N. W. 485

§ 1819. Property of Parties.

The alimony may be small where the husband's estate is small,[57] or where the husband has already provided for her,[58] or where she has separate property of her own,[59] and large where his estate is large.[60]

(obtained a previous divorce to marry defendant and lived with him only a short time); Youngs v. Youngs, 149 N. W. 1068; Banks v. Banks (Miss.), 79 So. 841.

57. Ginter v. Ginter, 104 N. E. 989; Spain v. Spain, 177 Ia. 249, 158 N. W. 529; Daly v. Daly, 154 Ia. 486, 131 N. W. 758; Shehan v. Shehan, 152 Ky. 191, 153 S. W. 243; Fisher v. Fisher (Mo. App.), 207 S. W. 261; Crawford v. Crawford, 64 Pa. Super. Ct. 30. See *ante*, 1781, 1806.

58. Corey v. Corey, 81 Ind. 469; Huffman v. Huffman, 53 Ind. App. 201, 101 N. E. 400; Halley v. Halley, 130 Ia. 683, 107 N. W. 807; Ferguson v. Ferguson, 147 Mich. 673, 111 N. W. 175, 14 Det. Leg. N. 32; Bowerman v. Bowerman, 145 Mich. 726, 108 N. W. 1086, 13 Det. Leg. N. 605; Blair v. Blair, 131 Mo. App. 571, 110 S. W. 652.

59. Sullivan v. Sullivan, 170 Mich. 557, 136 N. W. 482; Kraft v. Kraft, 160 Mich. 654, 125 N. W. 693, 17 Det. Leg. N. 159; McKinney v. McKinney, 80 W. Va. 745, 93 S. E. 831; Schwenn v. Schwenn, 143 Wis. 399, 127 N. W. 948. See Deitrick v. Deitrick, 88 N. J. Eq. 560, 103 A. 242.

Where the wife's separate property produces no income her ownership may not affect the award of alimony. Farrar v. Farrar (Cal. App.), 182 P. 989.

60. Van Gordor v. Van Gordor, 54 Colo. 57, 129 P. 226; Van Natta v. Van Natta (Ind.), 121 N. E. 825; Woodburn v. Woodburn, 47 Ind. 696, 95 N. E. 268; Dickinson v. Dickinson, 54 Ind. App. 53, 102 N. E. 389; Parsons v. Parsons, 152 Ia. 68, 131 N. W. 17; Kelly v. Kelly (Ky.), 209 S. W. 335; Pemberton v. Pemberton, 169 Ky. 476, 184 S. W. 378; Smith v. Smith, 181 Ky. 55, 203 S. W. 884; Burris v. Burris, 180 Ky. 365, 202 S. W. 906; Green v. Green, 152 Ky. 486, 153 S. W. 775; Lawler v. Lawler, 157 Mich. 107, 121 N. W. 294, 16 Det. Leg. N. 305; Freund v. Freund, 174 Mich. 337, 140 N. W. 509; Bialy v. Bialy, 167 Mich. 559, 133 N. W. 496; Ferguson v. Ferguson, 147 Mich. 673, 111 N. W. 175, 14 Det. Leg. N. 32 (husband's future interest should be valued at its market value and not according to annuity tables); Shered v. Shered, 172 Mich. 222, 137 N. W. 621; Searles v. Searles (Minn.), 168 N. W. 133; Fitzpatrick v. Fitzpatrick, 127 Minn. 96, 148 N. W. 1074; Viertel v. Viertel, 212 Mo. 562, 111 S. W. 579; Hauber v. Hauber, 170 Mo. App. 71, 156 S. W. 54; Howard v. Howard, 188 Mo. App. 564, 176 S. W. 483; Harner v. Harner (Mo. App.), 206 S. W. 385; James v. James (Neb.), 171 N. W. 904; Edholm v. Edholm, 156 N. W. 500; Davis v. Davis, 31 Ohio Cir. Ct. R. 136 (mere possibility of inheritance not included); Laycock v. Laycock, 52 Ore. 610, 98 P. 487; Blair v. Blair, 40 Utah, 306, 121 P. 19; Hendrix v. Hendrix

The fact that the husband was in the habit of receiving large gratuities from wealthy relatives may be considered,[61] and where the husband's property is of uncertain value a money award may be made.[62]

§ 1820. Husband's Debts.

The husband is not relieved from his duty to his wife by the fact that he owes debts,[63] but his indebtedness must be considered.[64]

§ 1821. Effect of Conveyances in Fraud of Dower.

The alimony will not be affected by the fact that the husband has made conveyances in fraud of the marital rights of the wife.[65]

§ 1822. Source of Property.

The court may consider that the parties have been married only a short time and that the wife had contributed nothing to the family funds, and therefore make the award small,[66] but it may be larger where the wife's labor or money has contributed to the property.[67] So where the wife obtains a divorce through the fault

(Wash.), 172 P. 819; Masterson v. Ogden, 78 Wash. 644, 139 P. 654; Shequin v. Shequin, 152 N. W. 823.

61. Sidway v. Sidway, 141 N. Y. S. 14, 156 App. Div. 61.

62. Willson v. Willson, 146 P. 615, judgment modified 86 Wash. 50, 149 P. 328.

63. Laycock v. Laycock, 52 Ore. 610, 98 P. 487.

64. Garrett v. Garrett, 252 Ill. 318, 96 N. E. 882, reversing judgment 160 Ill. App. 321.

65. Muir v. Muir, 28 Ky. Law Rep. 1355, 92 S. W. 314, 4 L. R. A. (N. S.) 909; Dongan v. Dongan, 9 Minn. 471, 97 N. W. 122; Griffith v. Griffith (Mo. App.), 190 S. W. 1021; Tuttle v. Tuttle, 26 S. D. 306, 128 N. W. 695. See Graves v. Graves, 138 Ia. 17, 115 N. W. 488 (alimony may be increased where husband's concealment of his property caused litigation to discover it).

66. Walston v. Walston, 126 N. W. 145; Thompson v. Thompson (Mich.), 171 N. W. 347; Spratler v. Spratler (Mich.), 169 N. W. 956; Lofvander v. Lofvander, 146 Mich. 370, 109 N. W. 662, 13 Det. Leg. N. 793; Hanrahan v. Hanrahan, 170 Mich. 79, 135 N. W. 899; Allen v. Allen, 155 N. W. 488; De Vry v. De Vry, 148 P. 840; Gust v. Gust, 78 Wash. 414, 139 P. 228; Uecker v. Thiedt, 133 Wis. 148, 113 N. W. 447.

67. Skinner v. Skinner, 47 Ind. App. 670, 95 N. E. 128; Johnson v. John-

of the husband, at least one-half of the property representing the joint accumulations of husband and wife for a lifetime should go to the wife. Where they have lived together until she is unable to perform hard labor, and have by their joint labor, management and economy acquired property sufficient to support them both comfortably when living together, when the wife is forced by the misconduct of the husband to seek separation she ought to receive sufficient property to support her comfortably living alone, without reference to her ability to work and contribute to her own support.[68]

§ 1823. Husband's Future Income.

The amount of alimony may depend on the husband's future probable income or earning power.[69]

son (Ky.), 209 S. W. 385; Burns v. Burns, 173 Ky. 105, 190 S. W. 683; Wells v. Wells, 143 Ky. 813, 137 S. W. 537; Glover v. Glover, 193 Mo. App. 648, 187 S. E. 278; Nathan v. Nathan (Nev.), 165 N. W. 955; Hartshorn v. Hartshorn (Okla.), 168 P. 822.

68. Van Gorder v. Van Gorder (Colo.), 129 P. 226, 44 L. R. A. (N. S.) 998.

69. Folda v. Folda, 174 Ala. 286, 56 So. 533; Olmstead v. Olmstead, 85 Conn. 478, 83 A. 628; Creel v. Creel, 43 App. D. C. 82; Van Natta v. Van Natta (Ind.), 121 N. E. 825; Evans v. Evans, 159 Ia. 338, 140 N. W. 801; Carter v. Carter, 140 Ky. 228, 130 S. W. 1102; Burton v. Burton (Ky.), 211 S. W. 869; Griffin v. Griffin, 173 Ky. 636, 191 S. W. 458; Ramsey v. Ramsey, 162 Ky. 741, 172 S. W. 1082; Griffin v. Griffin, 154 Ky. 766, 159 S. W. 597; O'Quin v. Evans (La.), 82 So. 587; Hanagriffe v. Hanagriffe, 122 La. 1012, 48 So. 438; Fleming v. Fleming, 152 N. W. 913; Abbott v. Abbott (Mich.), 168 N. W. 950; Bowerman v. Bowerman, 145 Mich. 726, 108 N. W. 1086, 13 Det. Leg. N. 605; Blair v. Blair, 131 Mo. App. 571, 110 S. W. 652; Anderson v. Anderson, 89 Neb. 570, 131 N. W. 907; Wheeler v. Wheeler, 94 A. 85 (husband's pension may be considered); Snyder v. Snyder, 162 N. Y. S. 607, 98 Misc. 431; Scheinkman v. Scheinkman, 118 N. Y. S. 775, 64 Misc. 443; Lape v. Lape (Ohio), 124 N. E. 51; McAndrews v. McAndrews, 31 Pa. Super. Ct. 252; Cooper v. Cooper, 64 Wash. 219, 116 P. 673; Deusenberry v. Deusenberry (W. Va.), 95 S. E. 665; Moses v. Moses, 152 Wis. 107, 139 N. W. 727.

Income from gambling. The court, in awarding permanent alimony, will not speculate on a future income from a continuous and persistent career of vice and criminality and adopt as a basis for its decree a division of the anticipated illegal spoils acquired by gambling. King v. King, 79 Neb. 852, 113 N. W. 538.

§ 1824. Wife's Future Expenses.

The wife's probable expenditure in litigation may be considered in awarding alimony.[70]

§ 1825. Effect of Dower Rights.

While the main basis for fixing the amount of the alimony is always the equity of the cases and the necessities of the wife, still also compensation should be made to her for her losses growing out of the divorce, and the court should consider the value of the wife's dower which she has lost by divorce,[71] and where a wife obtains a divorce for a husband's fault alimony will not be less than her interest in their property before divorce.[72] Alimony may be made in lieu of dower and may be limited to the remarriage of the wife,[73] and may be a sum in cash fixed at about a third of the husband's estate,[74] and the allowance for permanent alimony may be set at about one-third of the husband's income, not including the amount necessary for the wife, and also figuring in the amount of the wife's income.[75]

70. Wallace v. Wallace, 75 N. H. 217, 72 A. 1033.

71. Wesley v. Wesley, 181 Ky. 135, 204 S. W. 165.

72. Brasch v. Brasch, 168 Mich. 459, 134 N. W. 450; Brown v. Brown, 144 Mich. 654, 108 N. W. 288, 13 Det. Leg. N. 312; Delor v. Delor, 159 Mich. 624, 124 N. W. 544, 16 Det. Leg. N. 973. See Kiser v. Kiser, 108 Va. 730, 62 S. E. 936 (dower interest considered).

73. Sperry v. Sperry, 80 W. Va. 142, 92 S. E. 574.

74. Beene v. Beene, 64 Ark. 518, 43 S. W. 968; Closz v. Closz (Ia.), 169 N. W. 183; Doolittle v. Doolittle, 147 N. W. 893; Day v. Day, 168 Ky. 68, 181 S. W. 937; Snay v. Snay, 192 Mich. 210, 158 N. W. 858; Pingree v. Pingree, 170 Mich. 36, 135 N. W. 923; Zastrow v. Zastrow, 17 Det. Leg. N. 512, 127 N. W. 369; Warren v. Warren, 114 Minn. 389, 131 N. W. 379; Pierce v. Pierce, 96 Neb. 511, 148 N. W. 151; Andreas v. Andreas (N. J. Ch.), 102 A. 259; Drake v. Drake, 27 S. D. 329, 131 N. W. 294; Dober v. Dober (Wash.), 174 P. 14; McKinney v. McKinney, 80 W. Va. 745, 93 S. E. 831; Griffin v. Griffin, 18 Utah, 98, 55 P. 84.

75. Andreas v. Andreas (N. J. Ch.), 102 A. 259.

§ 1826. Fact That Wife Had Supported Herself During Marriage.

The alimony may be made larger where the wife had during marriage supplied herself out of her own separate property with clothing and other necessities.[76]

§ 1827. Marriage of Convenience.

The award may be small where the marriage was purely one of convenience, without love on either side.[77]

76. Carson v. Carson (Ia.), 171 N. W. 584.

77. Williamson v. Williamson (Ky.), 209 S. W. 503; Weidert v. Weidert (Wash.), 180 P. 135.

CHAPTER XXXV.

MODIFICATION OR TERMINATION OF ALIMONY.

SECTION 1828. Court's Power to Modify Decree.
1829. Award Based on Agreement.
1830. Sums Already Due or Gross Sums.
1831. Evidence of Change of Conditions.
1832. Laches, Failure to Pay Accrued Alimony.
1833. Death of Parties.
1834. Remarriage.

1828. Court's Power to Modify Decree.

The court may in its decree reserve the right to alter the payments as justice may require,[1] or the court may by statute be given the right to alter the payments at any time,[2] but except for reser-

1. Johnson v. Johnson, 195 Ala. 641, 71 So. 415; Jones v. Jones, 131 Ala. 443, 31 So. 91; Doerle v. Doerle, 159 N. Y. S. 637, 96 Misc. 72; Graff v. Graff, 6 Ohio App. 260; Read v. Read, 28 Utah, 297, 78 P. 675; Sperry v. Sperry, 80 W. Va. 142, 92 S. E. 574; Henrie v. Henrie, 71 W. Va. 131, 76 S. E. 837; Reinhard v. Reinhard, 96 Wis. 555, 71 N. W. 803 (finding in divorce that there should be a division and reference to determine it do not preclude the court on the coming in of the report from providing for permanent alimony in lieu of division). See Alexander v. Alexander, 13 App. D. C. 334.

2. McConnell v. McConnell, 98 Ark. 193, 136 S. W. 931; Soule v. Soule, 4 Cal. App. 97, 87 P. 205; Prewitt v. Prewitt (Colo.), 122 P. 766; Stevens v. Stevens, 31 Colo. 188, 72 P. 1061; Robowski v. Robowski, 242 Ill. 524, 90 N. E. 361; Welty v. Welty, 195 Ill. 335, 63 N. E. 161, 88 Am. St. R. 208 (after term at which divorce granted); Craig v. Craig, 163 Ill. 176, 45 N. E. 153 (although instalments due are unpaid); Crossett v. Whittmore, 206 Ill. App. 320; Kingman v. Kingman, 200 Ill. App. 338; Paulin v. Paulin, 195 Ill. App. 350; Bristow v. Bristow, 21 Ky. Law Rep. 481, 51 S. W. 819; Perkins v. Perkins, 225 Mass. 392, 114 N. E. 713; Brown v. Brown, 222 Mass. 415, 111 N. E. 42; Smith v. Smith, 190 Mass. 573, 77 N. E. 522 (additional alimony); Pingree v. Pingree, 170 Mich. 36, 135 N. W. 923; Kelly v. Kelly (Mich.), 160 N. W. 397; Roberts v. Roberts (Minn.), 161 N. W. 148 (making judgment lien against real estate); Barbaras v. Barbaras, 88 Minn. 105, 92 N. W. 522; Holmes v. Holmes, 90 Minn. 466, 97 N. W. 147; Wald v. Wald, 168 Mo. App. 377, 151 S. W. 786; Scales v. Scales, 65 Mo. App. 292; State v. Cook, 51 Neb. 822, 71 N. W. 733; Cizek v. Cizek, 76 Neb.

vation in the decree or express statutory authority the court has no power to alter its decree.[3]

Where the divorce is absolute, the alimony awarded is permanent, there are no minor children, there is no express reservation in the decree, and there is no statute conferring upon the court the authority to modify or alter its decrees in respect to alimony, the court has no authority to do so. The decree is like other decrees, final and conclusive, and the court has no power to alter it, but possesses only the right to enforce obedience to it in accordance with the great weight of authority.[4]

A statute permitting amendment does not apply to decrees entered prior to its passage,[5] and authorizes revision only based on

797, 107 N. W. 1012; Wallace v. Wallace, 75 N. H. 217, 72 A. 1033 (cannot make an order which could not have been made in the first place); Rigney v. Rigney, 62 N. J. Eq. 8, 49 A. 460 (although not expressly provided in law); Burton v. Burton, 135 N. Y. S. 248, 150 App. Div. 790; Horter v. Horter, 164 N. Y. S. 889, 177 App. Div. 827; Gibson v. Gibson, 143 N. Y. S. 37, 81 Misc. 508; Noble v. Noble, 46 N. Y. S. 820, 20 App. Div. 395, 5 N. Y. Ann. Cas. 1; Tonjes v. Tonjes, 43 N. Y. S. 941, 14 App. Div. 542; Gould v. Gould (Sup.), 42 N. Y. S. 147, 18 Misc. 334; Buzzo v. Buzzo, 45 Utah, 625, 148 P. 362 (although pleadings admit sum reasonable); Cross v. Cross, 98 Wash. 651, 168 P. 168; Ruge v. Ruge (Wash.), 165 P. 1063; Norris v. Norris, 156 N. W. 778; Zentzis v. Zentzis, 163 Wis. 342, 158 N. W. 284. See Hopkins v. Hopkins, 40 Wis. 462; Graves v. Graves, 108 Mass. 314; Hoff v. Hoff, 133 Minn. 86, 157 N. W. 999; Cain v. Cain, 90 Wash. 402, 156 P. 403; Wilde v. Wilde, 36 Ia. 319.

Where the local code gives full discretion, alimony for the divorced wife's life may be awarded in such a sense that, though she marries afterwards, the defendant is not relieved from the regular payments. Shepherd v. Shepherd, 1 Hun, 240.

3. Coffee v. Coffee, 101 Ga. 787, 28 S. E. 977; Wilkins v. Wilkins, 146 Ga. 382, 91 S. E. 415; Spain v. Spain, 177 Ia. 249, 158 N. W. 529; Mayer v. Mayer, 154 Mich. 386, 117 N. W. 890, 15 Det. Leg. N. 760; Smith v. Smith, 180 S. W. 568; Sweeney v. Sweeney (Nev.), 179 P. 638; Livingston v. Livingston, 61 N. Y. S. 299, 7 N. Y. Ann. Cas. 178, 46 App. Div. 18; Law v. Law, 64 Ohio St. 369, 60 N. E. 560; Mitchell v. Mitchell, 20 Kan. 665; Bacon v. Bacon, 43 Wis. 197.

4. Ruge v. Ruge (Wash.), 165 P. 1063, L. R. A. 1917F, 721.

5. Hauscheld v. Hauscheld, 53 N. Y. S. 831, 33 App. Div. 296, affd. 159 N. Y. 570, 54 N. E. 1094; Walker v. Walker, 47 N. Y. S. 513, 21 App. Div. 219, orders reversed, 155 N. Y. 77, 49 N. E. 663; Krauss v. Krauss, 111 N. Y. S. 788, 127 App. Div. 740 (annulment on remarriage).

new facts, and does not allow the insertion in the decree of a provision as to lien which might have been made in the original decree.[6]

The court may have authority to modify alimony only on evidence of such fraud or mistake as would authorize it to modify any other decree.[7]

However, the court has power to modify orders for alimony entered in case of a divorce from bed and board, as this power is incident to the jurisdiction to regulate the rights of the parties growing out of the marital status, which status is unaffected by the decree for legalized separation.[8]

§ 1829. Award Based on Agreement.

The court cannot modify a decree entered by consent of all parties as to alimony,[9] or based on contract,[10] and an allowance based on agreement may not be regarded as "alimony" subject to change by the court,[11] but it has been held that a statute authorizing the court to modify alimony will apply to a decree based on a property settlement.[12]

Where alimony is settled by agreement between the parties the court cannot amend a judgment which does not provide for alimony so as to include it and then strike it out on remarriage of the wife.[13]

6. Reynolds v. Reynolds, 115 Mich. 378, 73 N. W. 425, 4 Det. Leg. N. 927; *contra*, Burnside v. Wand, 77 Mo. App. 382 (security ordered).

7. Carr v. Carr (Ia.), 171 N. W. 785.

8. Ruge v. Ruge (Wash.), 165 P. 1063, L. R. A. 1917F, 721.

9. Van Sickle v. Harmeyer, 172 Ill. App. 218.

10. Pryor v. Pryor, 88 Ark. 302, 114 S. W. 700; Carr v. Carr (Ia.), 171 N. W. 785 (unless agreement based on mistake); Hatfield v. Hatfield (Okla.), 158 P. 942; *contra*, Emerson v. Emerson, 120 Md. 584, 87 A. 1033 (as validity depends on the decree and not on the contract); Wallace v. Wallace, 74 N. H. 256, 67 A. 580. See Soule v. Soule, 4 Cal. App. 97, 87 P. 205; Stanfield v. Stanfield, 22 Okla. 574, 98 P. 334; Lally v. Lally, 152 Wis. 56, 138 N. W. 651.

11. Newbold v. Newbold (Md.), 104 A. 366.

12. Skinner v. Skinner (Mich.), 171 N. W. 383.

13. Lester v. Lester, 169 N. Y. S. 267, 102 Misc. 630, 169 N. Y. S. 1101.

A decree for alimony may, however, be modified when based on a stipulation procured by fraud.[14]

§ 1830. Sums Already Due or Gross Sums.

Where, however, a gross sum is awarded as alimony the power of the court is at an end and the court has no power to modify it later,[15] and the wife, as each instalment falls due, acquires a vested right to it, and cannot therefore be deprived of it, and an order annulling past instalments already due cannot be made *nunc pro tunc*,[16] although the opposite view is held to the effect that the court may cancel accrued instalments on the ground that they are not a vested property right.[17]

§ 1831. Evidence of Change of Conditions.

Modification can only be ordered on proof of change of conditions, as the decree is final as to conditions existing at the time,[18]

14. Milekovich v. Quinn (Cal. App.), 181 P. 256.

15. Barkman v. Barkman, 94 Ill. App. 440; Martin v. Martin, 195 Ill. App. 32; Griswold v. Griswold, 111 Ill. App. 269.

Lump sum payable on default. A provision in a decree, modifying a decree of divorce, that a failure by the husband to pay any monthly instalment of $50 shall authorize judgment against him for $7,800 cannot stand. Schlarb v. Schlarb, 150 N. W. 593; Guess v. Smith, 100 Miss. 457, 56 So. 166; Narregang v. Narregang, 31 S. D. 459, 139 N. W. 341. See Miller v. Miller (Vt.), 95 A. 928.

16. Cotter v. Cotter, 225 F. 471, 139 C. C. A. 453; McGregor v. McGregor, 52 Colo. 292, 122 P. 390; Delbridge v. Sears (Ia.), 160 N. W. 218; Krauss v. Krauss, 111 N. Y. S. 788, 127 App. Div. 740; Beers v. Beers, 74 Wash. 458, 133 P. 605; *contra*, Linton v. Hall, 149 N. Y. S. 385, 89 Misc. 560.

17. Hartigan v. Hartigan (Minn.), 171 N. W. 925.

18. Meffert v. Meffert, 177 S. W. 1; Bradley v. Bradley (Cal. App.), 181 P. 237; Garrett v. Garrett, 96 N. E. 882, 252 Ill. 318, reversing judgment 160 Ill. App. 321; Seehausen v. Seehausen, 187 Ill. App. 159; Plotke v. Plotke, 177 Ill. App. 344; Walter v. Walter, 189 Ill. App. 345; Tobin v. Tobin, 29 Ind. App. 382, 64 N. E. 624; Holm v. Holm, 151 Ia. 159, 130 N. W. 912; Kinney v. Kinney, 150 Ia. 225, 129 N. W. 826; Brown v. Brown, 172 Ky. 754, 189 S. W. 921; Staton v. Staton, 164 Ky. 688, 176 S. W. 21, L. R. A. 1915F, 820; Hall v. Hall, 172 Mich. 210, 137 N. W. 536 (changed condition of wife but not of husband may be considered); Wern v. Wern, 171 Mich. 82, 137 N. W. 71;

and a slight change is not enough to warrant modification.[19] The husband's financial inability or the wife's wealth may not be alone ground for modifying the award, but the whole question is in the absolute discretion of the court.[20]

Alimony may be changed on grounds connected with the support of the children,[21] or may be increased where it becomes inadequate,[22] as where the wife becomes helpless and needs more than before.[23] Alimony may be reduced where the husband's income is decreased,[24]

Haskell v. Haskell, 116 Minn. 10, 132 N. W. 1129; Warren v. Warren, 116 Minn. 458, 133 N. W. 1009; Bowlby v. Bowlby, 91 Minn. 193, 97 N. W. 669 (where plaintiff enforces antenuptial contract for her support); Wallace v. Wallace, 74 N. H. 256, 67 A. 580; Levene v. Levene, 150 N. Y. S. 708, 165 App. Div. 953; Noble v. Noble (Sup.), 4 N. Y. S. 820, 20 App. Div. 395, 5 N. Y. Ann. Cas. 1; Sager v. Sager, 5 Ohio App. 489; Holt v. Holt, 23 Okla. 639, 102 P. 187 (where wife induced to obtain divorce by fraud of the husband); Van Horst v. Van Horst, 96 Wash. 658, 165 P. 886.

Where a change of financial condition of an applicant for reduction of alimony was not wilfully brought about, the application should be determined on the rules originally applicable to the award in the first instance. Haskell v. Haskell, 119 Minn. 484, 138 N. W. 787.

Perjury of the husband as to his property is no ground for a modification. Graves v. Graves, 132 Ia. 199, 109 N. W. 707.

19. Parkhurst v. Parkhurst, 118 Cal. 18, 50 P. 9; Ferguson v. Ferguson, 111 Ia. 158, 82 N. W. 490; Goodsell v. Goodsell, 95 N. Y. S. 242 107 App. Div. 625; Palica v. Palica, 114 Wis. 236, 90 N. W. 165.

20. Burdick v. Burdick, 171 N. Y. S. 247.

21. Hood v. Venable, 140 Ga. 363, 78 S. E. 1078; Sebastian v. Rose, 135 Ky. 197, 122 S. W. 120; Rindlaub v. Rindlaub, 28 N. D. 168, 147 N. W. 725; Foote v. Foote (N. J. Ch. 1908), 68 A. 467. See Phillippi v. Phillippi, 113 Mo. App. 55, 87 S. W. 529.

22. Frieseke v. Frieseke, 138 Mich. 458, 101 N. W. 632, 11 Det. Leg. N. 637.

Where the wife was at fault findings that the husband's income had increased and that the amount allowed was insufficient to maintain the wife in the style to which she was accustomed are insufficient to warrant an order increasing it. Lay v. Lay, 204 Ill. App. 511.

23. Case v. Case, 205 Ill. App. 507.

24. Ortman v. Ortman (Ala.), 82 So. 417; Kingman v. Kingman, 200 Ill. App. 338; Parsons v. Parsons, 26 Ky. Law Rep. 256, 80 S. W. 1187 (where husband disabled); Aldrich v. Aldrich, 166 Mich. 248, 131 N. W. 542; Barbaras v. Barbaras, 88 Minn. 105, 92 N. W. 522. See Kunze v. Kunze, 53 N. Y. S. 938, 5 N. Y. Ann. Cas. 8.

as where illness of the husband has caused him large expense and the wife needs less than before,[25] or where the wife inherits property sufficient for her needs.[26]

A decree decreeing insurance may be modified by providing that it shall be the property of the wife,[27] or, on the other hand, a decree of alimony may be changed or cut off altogether on evidence that the libellee has taken up an open life of shame. The courts will not permit vice to flaunt its banner unchallenged. The court may also change alimony into a permanent division of property between the parties.[28]

§ 1832. Laches, Failure to Pay Accrued Alimony.

The right to obtain a modification may be lost by delay or laches.[29] Where the defendant has failed to obey the order of the court as to alimony the court may refuse to entertain an application for its reduction,[30] or modification may be ordered on condition of payment of accrued instalments.[31]

§ 1833. Death of Parties.

The wife's right to alimony ceases on death of the husband,[32] and as her right to support terminates with her husband's death the court has no jurisdiction to impose a charge for alimony on his

25. Davis v. Davis, 79 N. Y. S. 621, 78 App. Div. 500.

26. Matthews v. Matthews (Cal. App.), 173 P. 1007.

27. Hoff v. Hoff, 133 Minn. 86, 157 N. W. 999.

28. Weber v. Weber, 153 Wis. 132, 140 N. W. 1052, 45 L. R. A. (N. S.) 875.

29. Nelson v. Nelson, 56 Wash. 571, 106 P. 138, rehearing denied 107 P. 195.

30. Rigney v. Rigney, 62 N. J. Eq. 8, 49 A. 460; Abbott v. Abbott (Mich.), 168 N. W. 950.

That a petitioner, asking for the modification of a divorce decree against him, *was in default* in the payment of alimony did not deprive him of the right to have his petition heard, as the courts should not put such a burden upon litigants where the statute does not do so. State v. Superior Court for King County, 78 Wash. 372, 139 P. 42.

31. Matzke v. Matzke, 173 N. Y. S. 244.

32. Mead v. Mead, 205 Ill. App. 327; Johns v. Johns, 166 N. Y. 613, 59 N. E. 1124, 60 N. Y. S. 865.

estate after his death,[33] but a provision for the payment of a monthly sum for the support of a child may not cease on the death of the husband.[34]

The arrears of alimony due a divorced wife at the time of her death may be collected by her executor or administrator, and the wife may also hold the husband's estate for alimony due and unpaid at the time of his death. Alimony is a judgment rendered after a verdict imposing a liability on the husband to pay a particular sum of money, and it does not abate until its purpose is accomplished any more than any other judgment for money.[35]

§ 1834. Remarriage.

The remarriage of a divorced wife cuts off her right to alimony from the date of her remarriage,[36] and alimony may be reduced to a nominal sum where the wife has remarried with a man able to support her, or retained only at a sum sufficient for support of the minor children.[37]

The remarriage of one against whom an order to pay alimony has been made is not a ground for modifying the award of alimony. A divorced husband who voluntarily assumes the additional obligation of supporting another wife ought not to be heard to urge that as a reason why he should be relieved to any extent

33. Whi'ney v. Whitney Elevator & Warehouse Co., 183 F. 678, 106 C. C. A. 28, affirming decree (C. C.) 180 F. 187; Hazard v. Hazard, 197 Ill. App. 612.

34. Creyts v. Creyts, 143 Mich. 375, 106 N. W. 1111, 114 Am. St. R. 656.

35. Van Ness v. Ransom, 215 N. Y. 557, 109 N. E. 593, L. R. A. 1916B, 852.

36. Tremper v. Tremper (Cal. App.), 177 P. 868; Morgan v. Lowman, 80 Ill. App. 557; Emerson v. Emerson, 120 Md. 584, 87 A. 1033; Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 11 Ann. Cas. 520; Brown v. Brown, 38 Ark. 324; Casteel v. Casteel, 38 Ark. 477.

37. Southworth v. Southworth, 168 Mass. 511, 47 N. E. 93; Hartigan v. Hartigan (Minn.), 171 N. W. 925; Wetmore v. Wetmore, 59 N. Y. S. 586, 27 Misc. 700; Kiralfy v. Kiralfy, 73 N. Y. S. 708, 36 Misc. 507, 10 N. Y. Ann. Cas. 346; Krauss v. Krauss, 111 N. Y. S. 788, 127 App. Div. 740.

from such allowance,[38] especially where he marries the woman who has been the cause of the divorce.[39]

It has been held, however, that where the husband has obtained a decree of divorce in another State and married again the rights of the second wife must be considered,[40] and alimony should not take a man's entire estate where he has married again and had children by a second wife. One-half or one-third of his property is the more proper rule.[41]

38. Kelly v. Kelly (Mich.), 160 N. W. 397; Levy v. Levy, 133 N. Y. S. 1084, 149 App. Div. 561. See Herrett v. Herrett, 80 Wash. 474, 141 P. 1158 (remarriage of a divorced husband is no reason for increasing the allowance to his first wife). See Newton v. Newton, 145 Wis. 261, 130 N. W. 105 (where alimony reduced on remarriage of husband who had only a small salary); Staton v. Staton, 164 Ky. 688, 176 S. W. 21, L. R. A. 1915F, 820; Smith v. Smith, 139 Mich. 133, 102 N. W. 631; Levy v. Levy, 149 App. Div. 561, 133 N. Y. Supp. 1084; Herrett v. Herrett, 80 Wash. 474, 121 P. 1158.

In the following cases, however, the court has apparently considered the remarriage as some reason for changing the allowance: Warren v. Warren, 114 Minn. 389, 131 N. W. 379; Aldrich v. Aldrich, 166 Mich. 248, 131 N. W. 542; Newton v. Newton, 145 Wis. 261, 130 N. W. 105.

39. Smith v. Smith, 139 Mich. 133, 102 N. W. 631, 11 Det. Leg. N. 766.

40. Toneray v. Toneray, 123 Tenn. 476, 131 S. W. 977.

41. Toneray v. Toneray (Tenn.), 131 S. W. 977, 34 L. R. A. (N. S.) 1106.

CHAPTER XXXVI.

ENFORCEMENT OF ALIMONY.

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§ 1835. Contempt as a Remedy.

A judgment for alimony differs from an ordinary judgment in this, that an ordinary judgment at law does not order the defendant to pay anything, but simply adjudicates the amount owing and remits the plaintiff to his ordinary remedies by execution or otherwise, while an order for alimony, though partaking of the nature of a judgment, goes further, and is a direct command of the court to the defendant to pay the sums therein mentioned. This com-

mand it has been the practice of the courts from time immemorial to enforce by proceedings for contempt.[42]

§ 1836. Jurisdiction of Court.

The contempt for failure to pay alimony may be punished by the court having jurisdiction of the divorce suit,[43] or by another court given jurisdiction by statute.[44]

§ 1837. Proceedings in Contempt.

The proceedings in contempt depend on local practice, and may be brought as an original proceeding or may be part of the proceedings in divorce.[45]

The proceedings are remedial in nature and may be prosecuted by the plaintiff in the divorce suit[46] when attachment or sequestration would not avail.[47]

§ 1838. Enforcement of Interlocutory Order.

Where instalments of alimony awarded *pendente lite* remain un-

42. Fowler v. Fowler (Okla.), 161 P. 227, L. R. A. 1917C, 89.

43. *Ex parte* Hall, 125 Ark. 309, 188 S. W. 827; Tolman v. Leonard, 6 App. D. C. 224; Wilkins v. Wilkins, 146 Ga. 382, 91 S. E. 415; Van Dyke v. Van Dyke, 125 Ga. 491, 54 S. E. 537; Welty v. Welty, 195 Ill. 335, 88 Am. St. R. 208; Cavenaugh v. Cavenaugh, 106 Ill. App. 209; Sebastian v. Rose, 135 Ky. 197, 122 S. W. 120; Carper v. Carper, 94 Miss. 598, 48 So. 186; Mattson v. Mattson, 84 N. J. Eq. 553, 94 A. 405; Stewart v. Stewart, 111 N. Y. S. 734, 127 App. Div. 724; Stanley v. Stanley, 101 N. Y. S. 725, 116 App. Div. 544; Merrifield v. Merrifield, 136 N. Y. S. 87; Reese v. Reese, 61 N. Y. S. 760, 46 App. Div. 156, 7 N. Y. Ann. Cas. 209, 30 Civ. Proc. R. 55; Gust v. Gust, 78 Wash. 412, 139 P. 199; Surry v. Surry, 78 Wash. 370, 139 P. 44; *contra*, *Ex parte* Kinsolving, 135 Mo. App. 631, 116 S. W. 1068. See Weich v. Weich, 110 N. Y. S. 201, 59 Misc. 238; Stanley v. Stanley, 101 N. Y. S. 725, 116 App. Div. 544.

44. Lane v. Lane, 27 App. D. C. 171; State v. Cook, 66 Ohio St. 566, 64 N. E. 567, 58 L. R. A. 625; Hutchinson v. Canon, 6 Okla. 725, 55 P. 1077; *Ex parte* Latham, 47 Tex. Cr. R. 208, 82 S. W. 1046; *In re* Cave, 26 Wash. 213, 66 P. 425, 90 Am. St. R. 736.

45. Barton v. Barton, 99 Kan. 727, 163 P. 179.

46. Barton v. Barton, 99 Kan. 727, 163 P. 179.

47. Conklin v. Conklin, 109 N. Y. S. 189, 125 App. Div. 280; Uttal v. Uttal, 125 N. Y. S. 2, 140 App. Div. 255.

paid the court has authority on petition filed after the decree to enforce payment of instalments.[48] But the violation of a preliminary injunction cannot be punished as for a contempt after the dissolution of this injunction by being merged in a final decree. As the injunction is dissolved, what was before unlawful when it was in force becomes lawful, and no basis remains upon which to predicate a proceeding in contempt.[49]

§ 1839. Enforcement of Contract to Pay Alimony.

A mere contract to pay alimony cannot be enforced by contempt proceedings.[50]

§ 1840. Demand and Notice.

Proceedings in contempt should usually be begun only after demand,[51] and personal service must be made to give the husband proper notice of the proceedings, as summary action cannot be taken.[52]

48. Gorham v. Gorham (Ga.), 94 S. E. 555.

Contempt is more properly applied to permanent than temporary alimony. Groves's Appeal, 68 Pa. St. 143. And see, generally, Burrows v. Purple, 107 Mass. 428; Lester v. Lester, 63 Ga. 356; Russell v. Russell, 69 Me. 336; Pain v. Pain, 80 N. C. 322; Andrews v. Andrews, 69 Ill. 609.

49. Canavan v. Canavan (N. M.), 139 P. 154, 51 L. R. A. (N. S.) 972.

50. Glynn v. Glynn, 8 N. D. 233, 7 N. W. 594; Clark v. Clark, 115 N. Y. S. 500, 130 App. Div. 610.

51. De Hoog v. De Hoog, 65 Mo. App. 246; Compton v. Compton, 110 N. Y. S. 775, 125 App. Div. 859; Vogel v. Vogel, 131 N. Y. S. 67, 146 App. Div. 928; Wallace v. Wallace, 125 N. Y. S. 561, 140 App. Div. 800; Stanley v. Stanley, 101 N. Y. S. 725, 116 App. Div. 544; Donovan v. Donovan, 137 N. Y. S. 1088, 153 App. Div. 883; Matzke v. Matzke, 173 N. Y. S. 244; Reich v. Reich, 167 N. Y. S. 660.

52. *In re* McCarty, 154 Cal. 534, 98 P. 540; Mitchell v. Superior Court in and for City and County of San Francisco, 163 Cal. 423, 125 P. 1061; Barton v. Barton, 99 Kan. 727, 163 P. 179; Weich v. Weich, 110 N. Y. S. 201, 59 Misc. 238; Wulff v. Wulff, 133 N. Y. S. 807, 74 Misc. 213, order affirmed 135 N. Y. S. 289, 151 App. Div. 22; Carr v. Carr, 118 N. Y. S. 625, 64 Misc. 435; Gunn v. Gunn, 105 N. Y. S. 340, 120 App. Div. 353; Dikeman v. Dikeman, 177 N. Y. S. 506; Stewart v. Stewart, 111 N. Y. S. 734, 127 App. Div. 724.

§ 1841. Trial by Jury.

The defendant in contempt proceedings is not entitled to a trial by jury.[1]

§ 1842. Defences in General.

The defendant cannot set up defences which were or might have been set up in the divorce suit as adultery of the wife.[2]

The pendency of a motion to set aside the judgment is no excuse for a failure to pay alimony.[3] Defences not set up are regarded as waived.[4]

The husband cannot set up in defence of a claim for alimony that money due him has been attached in his action for divorce.[5]

§ 1843. Inability to Pay as a Defence.

Failure to pay alimony as ordered is not a contempt *per se*,[6] but will be when the defendant is of sufficient ability to pay.[7] The

1. Stokes v. Stokes, 126 Ga. 804, 55 S. E. 1023.

2. Wilkins v. Wilkins, 146 Ga. 382, 91 S. E. 415.

3. Knauer v. Knauer, 106 N. Y. S. 491, 121 App. Div. 748.

4. Lake v. Houghton Circuit Judge, 172 Mich. 660, 138 N. W. 249.

5. Wright v. Wright (Conn.), 105 A. 684.

6. Otillio v. Otillio, 119 La. 965, 44 So. 799.

7. Beavers v. Beavers (Ga.), 97 S. E. 65; Woodall v. Woodall, 147 Ga. 676, 95 S. E. 233; Barclay v. Barclay, 184 Ill. 471, 56 N. E. 821; Deen v. Bloomer, 191 Ill. 416, 61 N. E. 131; Miller v. Miller, 210 Ill. App. 76; Kuebler v. Kuebler, 204 Ill. App. 259; Mueller v. Mueller, 202 Ill. App. 116; McGill v. McGill, 101 Kan. 324, 166 P. 501; State v. Jamison, 69 Minn. 427, 72 N. W. 451 (though order is erroneous); Canavan v. Canavan, 18 N. M. 640, 139 P. 154 (civil contempt); Krauss v. Krauss, 111 N. Y. S. 790, 127 App. Div. 743; Burdick v. Burdick, 171 N. Y. S. 247 (on adjudication); Compton v. Compton, 97 N. Y. S. 618, 111 App. Div. 923; Hoffman v. Hoffman, 28 Ohio Cir. Ct. R. 658; Wells v. Wells, 148 P. 723 (on indirect contempt); Bridgess v. State, 9 Okla. 450, 132 P. 503 (not a criminal contempt); *Ex parte* Davis, 101 Tex. 607, 111 S. W. 394; McGill v. McGill, 67 Wash. 303, 121 P. 469; State v. Smith, 17 Wash. 430, 50 P. 52; State v. Ditmar, 19 Wash. 324, 53 P. 350; Jones v. Jones, 75 Wash. 50, 134 P. 528 (where court orders either alimony or conveyance of property it is not a contempt to refuse to convey property); *contra*, Leeder v. State, 55 Neb. 133, 75 N. W. 541. See Goodsell v. Good-

defendant should not be committed to jail on failure to pay where it appears that he is unable to do so,[8] or where he has lost his property,[9] and there is no contempt where the defendant is unable to pay even though his inability arises from his wilful refusal to work.[10] The defendant should not be committed for contempt in failure to pay where the record shows that he was discharged on his sworn answer of inability to pay.[11]

The burden of proving inability to obey an order of the court is on the defendant.[12]

§ 1844. Wife's Earnings Not a Defence.

It is no defence to contempt proceedings that the wife earns sufficient to support herself.[13]

§ 1845. Ignorance or Good Faith as Defence.

A failure to pay in good faith and not wilfully may not be a

sell, 88 N. Y. S. 161, 94 App. Div. 443 (failure to pay pending a reference to determine defendant's financial ability is not contempt); Kalmanowitz v. Kalmanowitz, 95 N. Y. S. 627, 108 App. Div. 296; Comstock v. Comstock, 99 N. Y. S. 1057, 49 Misc. 599.

8. Davis v. Davis, 138 Ga. 8, 74 S. E. 830; Shaffner v. Shaffner, 182 Ill. App. 450, 451; Crombie v. Crombie, 88 Wash. 520, 153 P. 306; Holcomb v. Holcomb, 53 Wash. 611, 102 P. 653; Boyle v. Boyle, 74 Wash. 529, 133 P. 1009; Smiley v. Smiley, 99 Wash. 577, 169 P. 962.

Where the defendant has no property but makes no honest effort to earn money this is no defence to an award of alimony. Fowler v. Fowler (Okla.), 161 P. 227. See Lane v. Lane, 27 App. D. C. 171.

In New York a plea of poverty is no defence to an application for an order in contempt. Compton v. Compton, 110 N. Y. S. 775, 125 App. Div. 859; Cahzin v. Cahzin, 112 N. Y. S. 525 (husband should move for release).

9. Pettibone v. Pettibone, 126 N. Y. S. 676, 141 App. Div. 861 (where plaintiff compelled defendant to sacrifice his property).

10. Webb v. Webb, 140 Ala. 262, 37 So. 96, 103 Am. St. R. 30; *Ex parte* Todd, 119 Cal. 57, 50 P. 1071 (court cannot compel man to work to pay alimony).

11. Anderson v. Anderson, 205 Ill. App. 595.

12. Zippe v. Zippe, 143 Ill. App. 638; *Ex parte* Canavan, 17 N. M. 100, 130 P. 248.

13. Nipper v. Nipper, 133 Ga. 216, 65 S. E. 405.

contempt,[14] but a claim of ignorance of what was required of him is not a defence,[15] and even a refusal to pay because the defendant questions the legal effect of the order for payment will be contempt.[16]

§ 1846. Dismissal of Divorce Suit as Defence.

Arrears of temporary alimony are superseded by the entry of a final judgment dismissing the libel.[17]

§ 1847. Absence from Jurisdiction; Extradition.

An order will not issue for contempt against one without the jurisdiction, as it would be futile.[18]

The husband is not subject to extradition as a fugitive from justice if he is living apart from his wife in the State of his domicile and leaves her when not in arrears in payment of the sum agreed for her support and goes to another State, and subsequently fails to pay the amount agreed upon.[19]

14. *Ex parte* Hall, 125 Ark. 309, 188 S. W. 827 (where defendant in good faith believed he had overpaid); Dixon v. Dixon, 76 N. J. Eq. 364, 74 A. 995 (invalid order of foreign court).

Delay in appointing guardian. Where a divorce decree required the husband to pay a monthly sum to the guardian of a minor child for its support, but no guardian was appointed until more than a year later, the court properly found the husband not in contempt in refusing to pay the accrued amount on the appointment of a guardian. Waldron v. Waldron, 138 Ga. 788, 76 S. E. 348.

15. Adams v. Adams, 166 N. Y. S. 167, 179 App. Div. 152.

16. Longhi v. Longhi, 202 Ill. App. 8.

17. Hayes v. Hayes, 134 N. Y. S. 482, 74 Misc. 533, 135 N. Y. S. 225, 150 App. Div. 842, leave to appeal to Court of Appeals granted 135 N. Y. S. 116; Dietz v. Dietz, 136 N. Y. S. 341; Fauls v. Fauls, 138 N. Y. S. 459, 153 App. Div. 367.

18. Wulff v. Wulff, 135 N. Y. S. 289, 151 App. Div. 22, affirming order 133 N. Y. S. 807, 74 Misc. 213.

19. *Ex parte* Kuhns (Nev.), 137 P. 83, 50 L. R. A. (N. S.) 507.

§ 1848. Enforcement Against Beneficiary Under Spendthrift Trust.

The wife of a beneficiary under a spendthrift trust cannot subject to her alimony decree the trust funds.[20]

§ 1849. Order.

An order adjudging one in contempt should state that he owed a specified amount and that his failure to pay prejudiced the rights of the plaintiff,[21] and the failure of the order in contempt to recite the ability of the defendant to pay alimony does not vitiate it.[22] An order requiring the defendant to join with his wife in a deed does not require him to execute a warranty deed,[23] and an order denying a motion for contempt of an original order for alimony is not a bar to a motion based on a modified order.[24]

§ 1850. Imprisonment.

Where the husband fails to pay alimony as ordered he may be imprisoned for contempt until he does pay.[25] Statutes sometimes

20. De Rousse v. Williams (Ia.), 164 N. W. 896.

21. Hamblin v. Hamblin, 65 So. 113; Krauss v. Krauss, 111 N. Y. S. 790, 127 App. Div. 743; Schweig v. Schweig, 107 N. Y. S. 905, 122 App. Div. 787; Woolworth v. Woolworth, 100 N. Y. S. 865, 115 App. Div. 405 (limited to amount due when demand made). See Oxford v. Berry (Mich.), 170 N. W. 83 (redundant matter in order does not invalidate it); Phillips v. Phillips (Nev.), 180 P. 907 (as to effect of void order).

22. *Ex parte* Beavers (W. Va.), 91 S. E. 1076.

23. *In re* Butler, 82 Kan. 130, 107 P. 540.

24. Horter v. Horter, 164 N. Y. S. 889, 177 App. Div. 827.

25. *Ex parte* Joutsen, 154 Cal. 540, 98 P. 391; Beavers v. Beavers (Ga.), 97 S. E. 65; Gray v. Gray, 127 Ga. 345, 56 S. E. 438; Oxford v. Berry (Mich.), 170 N. W. 83; Millis v. State, 63 So. 344; Gardner v. Gardner, 130 N. Y. S. 801; Miller v. Miller (Wash.), 175 P. 295 (proceedings are ancillary); Smith v. Smith (W. Va.), 95 S. E. 199. See Hannan v. Hopkins, 44 App. D. C. 586 (no recovery of arrears).

limit the term of imprisonment,[26] or provide against imprisonment for more than once.[27]

In some States the order of imprisonment must show that the defendant has no property which may be attoched.[28]

§ 1851. Imprisonment for Contempt Is Not for a Debt.

A claim for alimony is not a debt within the prohibitions of the statute against imprisonment for debt.[29] So a statute providing for imprisonment for failure to carry out an order for support or alimony is not void as providing for imprisonment for debt as applied to an order to pay a certain sum monthly for support of a minor daughter as an allowance for the support of a minor child bears no resemblance whatever to a debt.[30] Furthermore, one imprisoned for failure to pay alimony is not imprisoned merely for debt, but also for contempt, and therefore cannot be released on taking the poor debtor's oath.[31]

A decree ordering the wife to pay over to the husband a trust fund beyond the jurisdiction of the court is not "for the payment of money" so as to be enforceable by execution, and may therefore be enforceable by contempt under a statute providing for cases where payment cannot be enforced by execution.[32]

26. People v. Walsh, 116 N. Y. S. 839, 132 App. Div. 462; Richards v. Richards, 130 N. Y. S. 799, 71 Misc. 532 (limitation of imprisonment for failure to pay alimony applies to temporary alimony); Chadwick v. Chadwick, 156 N. Y. S. 190, 170 App. Div. 328.

27. People *ex rel.* Levine v. Shea, 201 N. Y. 471, 94 N. E. 1060 (under statute defendant cannot be twice imprisoned for failure to pay alimony); Maran v. Maran, 122 N. Y. S. 9, 137 App. Div. 348. See State v. Smith (Mont. 1910), 111 P. 732.

28. Taliaferro v. Taliaferro, 171 N. Y. S. 25; Goldman v. Goldman, 171 N. Y. S. 26, 103 Misc. 700.

29. State v. King, 49 La. Ann. 1503, 22 So. 887; Carnahan v. Carnahan, 143 Mich. 390, 107 N. W. 73, 12 Det. Leg. N. 1023, 114 Am. St. R. 660; Lubbering v. State, 19 Ohio Cir. Ct. R. 658, 10 O. C. D. 508.

30. Fussell v. State (Neb.), 166 N. W. 197, L. R. A. 1918F, 421.

31. Mowry v. Bliss, 28 R. I. 114, 65 A. 616. See also *Ex parte* Morey, 28 R. I. 242, 66 A. 575.

32. Carnahan v. Carnahan, 143 Mich. 390, 107 N. W. 73, 12 Det. Leg. N. 1023, 114 Am. St. R. 660.

§ 1852. When Statute Providing for Imprisonment is Ex Post Facto.

Although a decree for alimony was rendered before the passage of a statute providing for the imprisonment of one failing to pay the alimony as oredred, still he may be punished under this law, and the law is not *ex post facto* as to him. Here the defendant did not refuse to comply with the terms of the decree until after the law went into effect, and it did not therefore affect him in any way until after his refusal to obey the order of the court.[33]

§ 1853. Purging of Contempt.

After commitment the defendant must purge himself and obtain his liberty on application to the court which committed him,[34] and he has a right to purge himself of the contempt by payment,[35] and may purge himself of contempt by showing actual inability and surrendering what he has.[36]

§ 1854. Conveyances in Fraud of Right to Alimony.

Conveyances made by a husband with intent to defraud his wife of her rights to alimony may be set aside as fraudulent,[37] and the same result is reached where the husband buys property and has

33. Fussell v. State (Neb.), 166 N. W. 197, L. R. A. 1918F, 421.

34. *Ex parte* Beavers (W. Va.), 91 S. E. 1076.

35. People v. Mehan, 198 Ill. App. 300.

36. Blake v. People, 80 Ill. 11.

37. Clagett v. Gibson (U. S. C. C., D. C. 1828), Fed. Cas. No. 2778, 3 Cranch. C. C. 359; Smith v. N. Y. Life Ins. Co. (U. S. C. C., Cal.), 57 F. 133; Tully v. Tully, 137 Cal. 60, 69 P. 700; Weyer v. Weyer (Cal. App.), 182 P. 776; Ruffenach v. Ruffenach, 13 Colo. App. 102, 56 P. 812; Moss v. Moss, 145 Ga. 311, 93 S. E. 875; Deke v. Huenkemeier (Ill.), 124 N. E. 381; Dieke v. Dieke, 182 Ill. App. 13; De Ruiter v. De Ruiter, 28 Ind. App. 9, 62 N. E. 100, 91 Am. St. R. 107; Davis v. Davis (Ia.), 173 N. W. 7; Ellison v. Davis, 159 Ky. 818, 169 S. W. 552 (mortgage); Shelton v. Shelton, 167 Ky. 167, 180 S. W. 83; Holland v. Holland, 121 Mich. 1, 79 N. W. 1102, 6 Det. Leg. N. 379; Byrnes v. Volz, 53 Minn. 110, 54 N. W. 942; Maze v. Griffin, 65 Mo. App. 377; Chittenden v. Chittenden, 22 Ohio Cir. Ct. R. 498, 12 O. C. D. 526; Nix v. Nix, 57 Tenn. (10 Heisk.) 546 (though wife consented in ignorance); Hines v. Sparks (Tex. Civ. App.), 146 S. W. 289; Crowder v. Crowder (Va.),

title placed in the hands of another for the same reason.[38] The purchaser is not protected where he has knowledge,[39] and the plaintiff need not prove actual knowledge of the fraud, but it is sufficient to show knowledge of suspicious circumstances.[40]

Such a conveyance will be valid when made before the husband had any knowledge of the intention of the wife to bring such proceedings,[41] and conveyances by a man fearing divorce proceedings to defeat a claim for alimony will be valid in the hands of the grantee in the absence of evidence of bad faith on his part.[42] So an order to pay alimony does not prevent legitimate transactions, as making a mortgage to a *bona fide* creditor or conveying property, where no alimony is due at the time,[43] and the conveyance may be sustained where it is to secure a debt owed at the time.[44]

§ 1855. Conveyance Before Marriage in Fraud of Alimony.

So a voluntary conveyance by a man under engagement to marry without the knowledge of his espoused, with intent to avoid her marital rights, is void as against her subsequent claim to alimony.[45]

99 S. E. 746. See Lockwood v. Krum, 34 Ohio St. 1 (where no fund as alimony provided for).

38. McFadden v. McFadden, 134 Ala. 337, 32 So. 719.

39. Campbell v. Trosper, 103 Ky. 602, 57 S. W. 245, 22 Ky. Law Rep. 277; Lancaster v. Cambron, 158 Ky. 396, 165 S. W. 416; Buffalo v. Letson, 33 Okla. 261, 124 P. 968; Tate v. Tate (Ohio C. C. 1898), 10 O. C. D. 321; Richmond v. Smith, 117 Wis. 290, 94 N. W. 35.

A bank, though knowing that a husband and wife are not living together harmoniously, and though foreseeing that the wife will obtain a divorce, may in good faith and in the ordinary course of business make loans to the husband and take a mortgage of his property as security for the same, and its lien is not subordinate to any interest which the wife may subsequently secure on obtaining a divorce. Du Bois v. First Nat. Bank, 43 Colo. 400, 96 P. 169.

40. Crowder v. Crowder (Va.), 99 S. E. 746.

41. Tuers v. Tuers, 131 Cal. 625, 63 P. 1008; Ullrich v. Ullrich, 68 Conn. 580, 37 A. 393.

42. Mehan v. Mehan, 203 Ill. 180, 67 N. E. 770; Cagle v. Ford (Ky.), 40 S. W. 685; Fiske v. Fiske, 173 Mass. 413, 53 N. E. 916.

43. Sidway v. Sidway, 141 N. Y. S. 391, 156 App. Div. 375.

44. Keohane v. Keohane (Cal. App.), 176 P. 386.

45. Goff v. Goff, 60 W. Va. 9, 53 S. E. 769, 9 Ann. Cas. 1083.

There are cases in this country holding a voluntary conveyance by a man before marriage void as in fraud of her rights to alimony, but these are all cases where the right to alimony has arisen before the decision of the court, and none of these cases go to the extent of holding that such a conveyance is void in anticipation that the wife might some time in the future become entitled to alimony or separate maintenance against her husband.[46]

§ 1856. Collection of Arrears; Laches.

Arrears of alimony may be collected by action like a debt or by contempt proceedings,[47] although the plaintiff may be barred by inaction for a long period by laches to enforce collection of arrears of alimony.[48]

§ 1857. Denial of Privileges of Court to One in Arrears.

It is, we submit, the law in this country that no litigant can be denied his day in court as punishment for refusal to pay alimony, and it is held by our Supreme Court that to order the pleadings of a litigant struck from the court records because he has failed to obey its order is a denial to him of his constitutional rights to be

46. Fahey v. Fahey, 43 Colo. 354, 96 P. 251, 18 L. R. A. (N. S.) 1147; Botts v. Botts, 25 Ky. Law Rep. 300, 74 S. W. 1093; Goff v. Goff, 60 W. Vo. 9, 53 S. E. 769, 9 Ann Cas. 1083.

47. Demonet v. Burkhart, 23 App. D. C. 308 (to date of wife's second marriage); Shaffner v. Shaffner, 212 Ill. 492, 72 N. E. 447; Cheever v. Kelly, 96 Kan. 269, 150 P. 529; Kalfus v. Davie's Ex'r, 164 Ky. 390, 175 S. W. 652; Montgomery v. Offutt, 136 Ky. 157, 123 S. W. 676 (up to second marriage); Franck v. Franck, 107 Ky. 362, 54 S. W. 195, 21 Ky. Law Rep. 1093 (up to wife's marriage); Gerrein's Adm'r v. Michie, 28 Ky. Law Rep. 1193, 91 S. W. 252; Morton v. Morton, 58 Mass. (4 Cush.) 518. See Slade v. Slade, 106 Mass. 499; Anonymous, 12 Abb. N. C. 160; Van Ness v. Ransom, 215 N. Y. 557, 109 N. E. 593; Van Ness v. Ransom, 150 N. Y. S. 251, 164 App. Div. 483, affg. judg., 144 N. Y. S. 420, 83 Misc. 178 (release); De Vall v. De Vall, 57 Ore. 128, 109 P. 755. See Walter v. Walter, 15 App. D. C. 333.

48. McGill v. McGill, 101 Kan. 324, 166 P. 501.

heard,[49] and this doctrine is peculiarly applicable to divorce cases in which the State is interested.[50]

It is, however, the common practice of the State courts to refuse to hear one in arrears in payment of alimony. Although we believe for the reasons stated above that such action is unconstitutional, it is commonly held that alimony may be enforced by denying the defendant in arrears the privilege of the court,[51] and an action for divorce may even be abated where the husband is libellant and is unable to provide for his wife during its pendency.[52] The rule is that where the husband is in default in paying alimony *pendente lite* it is not an abuse of discretion on the part of the trial court to refuse to proceed with the cause upon the merits until the order requiring the payment of such alimony is complied with, and the mere fact that the husband has appealed from the order adjudging him in contempt does not alter the case, as if an appeal would give the husband a right to a trial he could defeat the purpose for which such money was awarded.[53]

But the fact that the husband is in contempt for failure to pay alimony on separation does not deprive him of his right to bring an independent action for divorce.[54]

§ 1858. Decisions Appealable.

An order allowing alimony is a final judgment from which an appeal will usually lie,[55] and an order for alimony *pendente lite* is

49. Hovey v. Elliott, 167 U. S. 409.

50. Naveja v. Naveja, 179 N. Y. Supp. 881.

51. Krieger v. Krieger, 221 Ill. 479, 77 N. E. 909, revg. judg. (1905), 120 Ill. App. 634, and affg. judg., 121 Ill. App. 11; State *ex rel.* Dawson v. St. Louis Court of Appeals, 99 Mo. 216, 12 S. W. 661 (husband plaintiff denied his decree); Reed v. Reed, 70 Neb. 779, 98 N. W. 73.

52. Frey v. Frey, 61 Colo. 581, 158 P. 714.

53. State v. Superior Court (Wash.), 148 P. 882, L. R. A. 1915E, 567.

54. Tafel v. Tafel, 155 N. Y. S. 164, 169 App. Div. 417.

55. Pereira v. Pereira, 156 Cal. 1, 103 P. 488; Harron v. Harron, 128 Cal. 303, 60 P. 932; Eickhoff v. Eickhoff, 27 Colo. 380, 61 P. 225; Stokes v. Stokes, 126 Ga. 804, 55 S. E. 1023; Charlton v. Charlton (Ga. 1871), 43 Ga. 178; *In re* Bell's Estate, 210 Ill. App. 350; Delbridge v. Sears (Ia.), 160 N. W. 218; Kremer v. Kremer,

also usually appealable,[56] and an appeal lies from an order modifying alimony,[57] and an order refusing alimony is also appealable.[58]

An order committing the husband for contempt for failing to pay alimony is appealable,[59] but a writ of error will not usually lie.[60]

90 P. 998, judg. mod. 76 Kan. 134, 91 P. 45; Caudill v. Caudill, 172 Ky. 460, 189 S. W. 431; Coleman v. Coleman, 164 Ky. 709, 176 S. W. 186; Griffin v. Griffin, 154 Ky. 766, 159 S. W. 597; Sebastian v. Rose, 135 Ky. 197, 122 S. W. 120; Dale v. Hauer, 109 La. 711, 33 So. 741; Chappell v. Chappell, 86 Md. 532, 39 A. 984; Griffith v. Griffith, 180 S. W. 411; Fiesler v. Fiesler, 83 Ohio St. 200, 93 N. E. 899; Hengen v. Hengen, 85 Ore. 155, 166 P. 525; Phillips v. Phillips, 39 R. I. 92, 97 A. 593; State v. Superior Court of King County, 74 Wash. 689, 134 P. 178; *contra*, Page v. Page, 35 Ohio Cir. R. 285; Williams v. Williams (Tex.Civ.App.1910), 125 S. W. 937, 1199; Dawson v. Dawson (Tex. Civ. App. 1911), 140 S. W. 513.

56. Shirley v. Shirley, 79 Ark. 473, 96 S. W. 164; Stewart v. Stewart, 28 Ind. App. 378, 62 N. E. 1023; Traylor v. Richardson, 2 Ind. App. 452, 28 N. E. 205; Kelly v. Kelly, 179 Ky. 586, 200 S. W. 925 (appeal by wife when insufficient alimony allowed); Schuster v. Schuster, 84 Minn. 403, 87 N. W. 1014; Marx v. Marx, 94 Mo. App. 172, 67 S. W. 934; Garsed v. Garsed, 87 S. E. 45; Barker v. Barker, 136 N. C. 316, 48 S. E. 733; Livingston v. Livingston, 173 N. Y. 377, 66 N. E. 123, 93 Am. St. R. 600, 61 L. R. A. 800; Gordon v. Gordon, 91 S. C. 245, 74 S. E. 360; Messervy v. Messervy, 79 S. C. 58, 60 S. E. 692; *contra*, Lawrence v. Lawrence, 141 Ala. 356, 37 So. 379; Jordan v. Jordan, 175 Ala. 640, 57 So. 436; Bender v. Bender, 98 Ga. 717, 25 S. E. 924 (no appeal pending divorce suit); Fowler v. Fowler (Okla.), 161 P. 227; Clay v. Clay, 108 P. 119, rehearing denied 56 Ore. 538, 109 P. 129; Gardner v. Gardner (Tex. Civ. App.), 154 S. W. 1064.

57. Prewitt v. Prewitt, 52 Colo. 522, 122 P. 766; Haskell v. Haskell, 119 Minn. 484, 138 N. W. 787 (refusing to modify); State v. Cook, 51 Neb. 822, 71 N. W. 733; Davis v. Davis, 79 N. Y. S. 621, 78 App. Div. 500; Liebig v. Liebig (Wash.), 182 P. 605; *contra*, Kapp v. Kapp, 31 Nev. 70, 99 P. 1077. See Motley v. Motley, 93 Mo. App. 473, 67 S. W. 741.

58. Robinson v. Robinson, 158 Cal. 117, 110 P. 112; Thompson v. Thompson, 27 Ky. Law Rep. 516, 85 S. W. 730; Smith v. Smith, 139 Mich. 133, 102 N. W. 631, 11 Det. Leg. N. 766; Smith v. Smith, 151 Mo. App. 649, 132 S. W. 312; Smith v. Smith, 144 S. W. 1199, 164, Mo. App. 444, 132 S. W. 312, adopting opinion, 151 Mo. App. 649; Cody v. Cody, 154 P. 952; *contra*, Brown v. Brown, 222 Mass. 415, 111 N. E. 42. See Swearingen v. Swearingen (Tex. Civ. App.), 165 S. W. 16.

59. Ross v. Ross, 47 Mich. 185, 10 N. W. 193. See Campbell v. Campbell (Tenn. Ch. App. 1898), 46 S. W. 308.

60. Smith v. Smith (W. Va.), 95 S. E. 199.

§ 1859. Security for Payment.

Under statutes in some States the trial court may require security for the payment of alimony,[61] although the court may have no power after the lapse of a long period of time to order such security given.[62] Furthermore, a decree for divorce may be revised so as to make the original decree for alimony a specific lien on the after-acquired real estate.[63]

§ 1860. Placing Alimony in Trust.

Alimony should not be ordered placed in trust unless under certain peculiar circumstances,[64] and the court should not appoint a trustee for alimony awarded where neither of the parties asked for it, so long as the wife is mentally competent and does not come within the rule of being a spendthrift. It is not enough that it is for her best interests to have a trustee appointed, as one mentally competent is entitled to manage her own affairs.[65]

61. (C. C.) Whitney v. Whitney Elevator & Warehouse Co., 180 F. 187, decree affd. (C. C. A.), 183 F. 678; Laufer v. Laufer, 61 Ind. App. 508, 112 N. E. 106; Smith v. Smith, 180 S. W. 568 (where husband's property consisted mostly of personalty); Maney v Maney, 104 N. Y. S. 541, 119 App. Div. 765; Miller v. Miller, 64 Me. 484; Guenther v. Jacobs, 44 Wis. 354. See Swain v. Jaudon, 147 Ga. 773, 95 S. E. 696, 95 S. E. 1020.

62. Hauck v. Hauck, 198 Mo. App. 381, 200 S. W. 679.

63. Roberts v. Roberts (Minn.), 161 N. W. 148, L. R. A. 1917C, 1140.

64. Nathan v. Nathan (Neb.), 165 N. W. 955.

65. Blair v. Blair (Utah), 121 P. 19, 38 L. R. A. (N. S.) 269.

CHAPTER XXXVII.

FOREIGN DECREE FOR ALIMONY.

SECTION 1861. Power of Local Court to Award Alimony After Foreign Decree.
1862. Enforcement of Foreign Judgment for Alimony.
1863. Effect of Foreign Decree on Land in State.
1864. Fixing Alimony Based on Foreign Decree.
1865. Estoppel to Enforce Foreign Judgment for Alimony.
1866. Service Necessary to Render Valid Decree as to Alimony.
1867. Foreign Suit for Maintenance.

§ 1861. Power of Local Court to Award Alimony After Foreign Decree.

Under the full faith and credit clause of the Federal Constitution a defendant in one State, in an action to recover alimony awarded by the court of another State, cannot attack the validity of the decree where the court which rendered it had jurisdiction of the parties.[66] Thus, where a decree of divorce is rendered in a proceeding where the court has jurisdiction of the parties by personal service, and where by consent an award of alimony is made in a lump sum, this is final, and the wife cannot obtain a separate decree of alimony out of lands of the husband in another State, although the court which rendered the decree had no jurisdiction over such land, especially where its existence and value was considered in fixing the amount of the alimony. Failure to recognize this decree as final does not give that due faith and credit required by the Federal Constitution.[67]

A decree of a foreign court giving the husband a divorce is

66. Thompson v. Thompson, 226 U. S. 551, 33 Sup. Ct. Rep. 129, 57 L. Ed. 347; White v. Warren, 214 Mass. 204, 100 N. E. 1103; Arrington v. Arrington, 127 N. C. 190, 37 S. E. 212, 80 Am. St. R. 791, 52 L. R. A. 201; Lynde v. Lynde, 162 N. Y. S. 405, 56 N. E. 979, 48 L. R. A. 679, affd. 181 U. S. 183, 21 S. Ct. 555, 45 L. Ed. 810.

67. Bates v. Bodie, 245 U. S. 520, 38 Sup. Ct. Rep. 182, L. R. A. 1918C, 355, revg. 95 Neb. 757, 146 S. W. 1002, L. R. A. 1915E, 421.

usually a bar to an action by the wife for alimony,[68] and the omission of alimony in a foreign decree for divorce is usually a final decree on the subject, and is a bar to an attempt to obtain alimony in another State.[69] But where a wife obtains a decree of divorce on substituted service, the husband not personally appearing, and the decree reserves the question of alimony for subsequent consideration by any court having jurisdiction, the wife may afterwards institute suit in another jurisdiction where the husband resides and has property and have her alimony determined.[70]

Furthermore, an award of alimony by a foreign court is final as to conditions then existing, but does not preclude an award of alimony on grounds subsequently arising.[71] So where the wife still lives in the State of the matrimonial domicile an action can be maintained by her for alimony, although the husband may have obtained a divorce from her upon publication in a foreign State. In view of the decisions of the Supreme Court the courts of each State are free to accord what effect they desire to decrees of foreign courts obtained without personal service or appearance. It is therefore no longer true that a divorce proceeding should be regarded as *in rem* and to ascribe to the court granting a divorce on constructive service jurisdiction of the *res,* or marital relation.[72]

Where a wife obtains a judgment for alimony in a stipulated sum in one State and brings suit on this judgment in another State where the defendant is domiciled, the judgment is a bar to a separate petition under the statute for alimony for support,[73] but the pendency of the suit for alimony is not a bar to the suit on the judgment.[74] The claim for alimony becomes merged in the judg-

68. Joyner v. Joyner, 131 Ga. 217, 62 S. E. 182, 18 L. R. A. (N. S.) 647.

69. McCormick v. McCormick, 82 Kan. 31, 107 P. 546.

70. Darnell v. Darnell (Ill. App. 1918), 67 Wash. Law Rep. 23.

71. Cadwell v. Cadwell, 2 Ohio App. 278, 35 Ohio Cir. Ct. R. 53.

72. Toncray v. Toncray (Tenn.), 131 S. W. 977, 34 L. R. A. (N. S.) 1106.

73. Underwood v. Underwood, 139 Ga. 241, 77 S. E. 46, L. R. A. 1918A, 1.

74. Underwood v. Underwood, 139 Ga. 241, 77 S. E. 46, L. R. A. 1918A,

ment, and this becomes then a suit on a debt of a different nature from the petition for alimony.

§ 1862. Enforcement of Foreign Judgment for Alimony.

The question of the enforceability of a foreign judgment for alimony seems to depend entirely on whether it is subject to modification. Under the full faith and credit clause of the Federal Constitution the courts of one State must enforce a judgment for alimony rendered in another State for a definite sum, but are not bound to enforce the judgment so far as it applies to future payments subject to revision of the court,[75] and an action of debt may be brought for amounts overdue on an accruing allowance made by a foreign court.[76] So an order for alimony payable in instalments, made in a divorce action in one State, subject under the laws of that State to modification, will not support an action as on a judg-

1; Steers v. Shaw, 53 N. J. L. 358, 21 A. 940; *contra*, Westervelt v. Jones, 7 Kan. App. 70 52 P. 194.

75. Valiquet v. Valiquet, 177 F. 994; Cureton v. Cureon, 132 Ga. 745, 65 S. E. 65; Wells v. Wells, 209 Mass. 282, 95 N. E. 845; Bolton v. Bolton, 89 A. 1014; Lynde v. Lynde, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, affd., 181 U. S. 183, 21 S. Ct. 555, 45 L. Ed. 810; Moore v. Moore, 126 N. Y. S. 936, 142 App. Div. 459, 128 N. Y. S. 259, 143 App. Div. 428, 208 N. Y. 97, 101 N. E. 711 (may require defendant to give security); Campbell v. Campbell, 28 Okla. 838, 115 P. 1111; Bleuer v. Bleuer, 27 Okla. 25, 110 P. 736; De Vall v. De Vall, 57 Ore. 128, 109 P. 755; Gaffey v. Critser (Tex. Civ. App.) 195 S. W. 1166; Ogg v. Ogg (Tex. Civ. App.), 165 S. W. 912; Hunt v. Monroe, 32 Utah, 428, 91 P. 269. See Cotter v. Cotter, 225 F. 471, 139 C. C. A. 453.

76. Sistare v. Sistare, 30 S. Ct. 682, 218 U. S. 1, 54 L. Ed. —, revg. judg. (1907), 80 Conn. 1, 66 A. 772, 125 Am. St. R. 102 (unless overdue alimony may be modified); McGregor v. McGregor, 52 Colo. 292, 122 P. 390 (where the court has no right to modify decree as to past due instalments); Phillips v. Kepler, 47 App. D. C. 384; Schroeder v. Schroeder, 86 S. E. 224; Rogers v. Rogers, 46 Ind. App. 506, 89 N. E. 901; McCullough v. McCullough (Mich.), 168 N. W. 929; Bolton v. Bolton, 86 N. J. Law, 622, 92 A. 389, affg. judg., 86 N. J. Law, 69, 89 A. 1014; Levy v. Dockendorff, 163 N. Y. S. 435, 177 App. Div. 249; Richards v. Richards, 149 N. Y. S. 1028, 87 Misc. 134; Williamson v. Williamson, 155 N. Y. S. 423, 169 App. Div. 597; Wagner v. Wagner, 26 R. I. 27, 57 A. 1058, 65 L. R. A. 816.

ment in another State, as the same is not a final judgment for a fixed sum,[77] but a final decree for future alimony, which is not under the domestic law capable of being modified, is as final and conclusive as any other decree, and is entitled to full faith and credit.[78]

An order for temporary alimony, subject to modification by the court rendering it, cannot be enforced by a foreign court, as such attempt might result in a conflict of authority.[79]

It is now settled that, *prima facie* at least, a decree for the payment of a fixed sum of money found to be already due and payable to a wife for the past support of herself and her children, is to be regarded as a final decree, entitled to full faith and credit in another State, although an order for future payments, as a provision for future support, being ordinarily subject to modification at any time, is not a final order for the payment of money.[80]

Action must be based on a foreign judgment and not on a mere finding of the foreign court,[81] and a foreign decree for alimony will be enforced by action at law on the judgment, equity not having jurisdiction,[82] except that a money judgment for alimony made by a foreign court may be enforced in equity in an action for contempt.[83]

77. Lynde v. Lynde, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679; Gilbert v. Gilbert, 83 Ohio St. 265, 94 N. E. 421, 35 L. R. A. (N. S.) 521; Collard v. Collard, 7 Ohio App. 53.

78. Paulin v. Paulin, 195 Ill. App. 350; Patton v. Patton, 123 N. Y. S. 329, 67 Misc. 404; Tiedemann v. Tiedemann, 158 N. Y. S. 851, 172 App. Div. 819, 156 N. Y. S. 111, 92 Misc. 417.

79. Mills v. Mills, 158 N. Y. S. 753, 95 Misc. 231; Van Horn v. Van Horn, 48 Wash. 388, 93 P. 670.

80. McFadden v. McFadden, 134 Ala. 337, 32 So. 719; Page v. Page, 189 Mass. 85, 75 N. E. 92; Wells v. Wells, 209 Mass. 282, 95 N. E. 845, 35 L. R. A. (N. S.) 561; Martin v. Thison, 153 Mich. 516, 116 N. W. 1013, 18 L. R. A. (N. S.) 257.

81. Rowe v. Rowe, 76 Ore. 491, 149 P. 533; Henry v. Henry, 74 W. Va. 563, 82 S. E. 522 (interlocutory decree).

82. Bennett v. Bennett, 63 N. J. Eq. 306, 49 A. 501.

83. White v. White (Mass.), 123 N. E. 389.

§ 1863. Effect of Foreign Decree on Land in State.[84]

A decree as to alimony in one State having full jurisdiction may be conclusive as to the rights of the parties to land in another State,[85] and an order requiring the defendant to account for all community property may be enforced in a court of another State where the property lies.[86] However, a decree of a foreign State as to division of property will not be binding as to real property in another State whose laws prescribe a different division,[87] as the rights of the parties to real estate on divorce depend on the law of the jurisdiction where the land lies.[88]

§ 1864. Fixing Alimony Based on Foreign Decree.

The court has no power to fix alimony based on a foreign decree for divorce under a statute authorizing it to enforce domestic alimony decrees,[89] and a statute providing that the non-payment of alimony shall be punished as a contempt of court applies only to judgments rendered within the State.[90]

§ 1865. Estoppel to Enforce Foreign Judgment for Alimony.

One who attempts to obtain a divorce on a claim that a foreign

84. Effect of decree on land in another State, see *ante* § 1761, *post* §§ 1874, 1975.

85. Fall v. Fall, 75 Neb. 104, 106 N. W. 412, reversed on rehearing (1907), 113 N. W. 175. See Bates v. Bodie, 245 U. S. 520, 38 Sup. Ct. R. 182, L. R. A. 1918C, 355, revg. 95 Neb. 757, 146 N. W. 1002, L. R. A. 1915E, 421, discussed, *ante* § 1861.

86. Tiedemann v. Tiedemann, 156 N. Y. S. 111, 92 Misc. 417, judg. mod., 158 N. Y. S. 851.

87. Sharp v. Sharp, 166 P. 175, L. R. A. 1917F, 562; Pinkley v. Pinkley, 155 Ky. 203, 159 S. W. 795; Keenan v. Keenan (Nev.), 164 P. 351; Williams v. Williams, 83 Ore. 59, 162 P. 834; Robinson v. Scott, 81 Ore. 20, 158 P. 268; *contra,* Matson v. Matson (Ia.), 173 N. W. 127. See Zentzis v Zentzis, 163 Wis. 342, 158 N. W. 284 (court may order real estate in another State transfered).

88. White v. Warren, 214 Mass. 204, 100 N. E. 1103; Van Cortlandt v. De Graffenried, 204 N. Y. 667, 98 N. E. 1118, affirming order De Graffenried v. Same (Sup.), 132 N. Y. S. 1107; Buckley v. Buckley, 50 Wash. 213, 96 P. 1079.

89. Page v. Page, 189 Mass. 85, 75 N. E. 92. See Fred v. Fred, 67 N. J. Eq. 495, 58 A. 611.

90. Lynde v. Lynde, 162 N. Y. 405, 56 N. E. 979, 48 L. R. 679, aff'd., 181 U. S. 183, 45 L. Ed. 810.

divorce is void cannot then attempt to enforce alimony allowed in the foreign decree as she is estopped,[91] but a decree for alimony in one State is not waived by the wife appearing to defend an action for divorce in another State, and there asking simply for alimony for defence of the action in that State.[92] It is a defence to an action on a foreign judgment for alimony that the plaintiff has remarried, and that remarriage causes the right to alimony to cease under the law of the foreign State.[93] Alimony cannot be collected in behalf of a minor son where ordered by a foreign court where the wife had released her rights, although the release was not binding on the son.[94]

§ 1866. Service Necessary to Render Valid Decree as to Alimony.

A decree of a foreign court which never acquired jurisdiction of the libellee is unenforceable,[95] and the foreign decree may be binding only to the extent of determining the matrimonial status of the parties and not alimony, where service is only by publication.[96]

It is well settled that a personal judgment or decree for alimony rendered in a divorce case against a non-resident, where the only service is by publication, is void everywhere.[97] It is equally clear that an attempted service by publication upon a resident defendant who is personally present within the State and can be found therein confers no jurisdiction to render a personal judgment.

91. Bidwell v. Bidwell, 139 N. C. 402, 2 L. R. A. (N. S.) 324, 111 Am. St. R. 797.

92. Wood v. Price, 79 N. J. Eq. 1, 81 A. 1093, decree affirmed (Err. & App. 1911), 79 N. J. Eq. 620, *Id.* 983.

93. Werner v. Pelleter, 131 N. Y. S. 1010, 148 App. Div. 137. See Taylor v. Stowe, 218 Mass. 248, 105 N. E. 890.

94. Levy v. Dockendorff, 163 N. Y. S. 435, 177 App. Div. 249.

95. *Ex parte* McMullin, 19 Cal. App. 481, 126 P. 368; Underwood v. Underwood, 142 Ga. 441, 83 S. E. 208; Downs v. Downs' Adm'r, 123 Ky. 405, 96 S. W. 536, 29 Ky. Law Rep. 849.

96. Spradling v. Spradling (Okla.), 181 P. 148.

97. Stallings v. Stallings, 127 Ga. 464, 56 S. E. 469, 9 L. R. A. (N. S.) 593; Roberts v. Roberts (Minn.), 161 N. W. 148, L. R. A. 1917C, 1140.

because not due process of law. But where service by publication is made upon a resident defendant who is within the State, but cannot be found therein because he has secreted himself to avoid service of process, this is binding as within the power of the State to legislate as to its own citizens.[98]

§ 1867. Foreign Suit for Maintenance.

Where a judgment in a suit for maintenance is entered on a stipulation which recites that the wife is without fault, and such judgment would not bar the husband from recontesting the wife's desertion in the State where rendered, it could not have that effect in another State,[99] but where a decree that a wife left her husband for just cause is a bar to proceedings for divorce on the ground of desertion in that State, the decree will also be a bar to action for divorce in another State,[1] and the decree of a foreign court, obtained without service of process, is not binding on the right of the defendant wife to obtain support in her domicile.[2]

98. Roberts v. Roberts (Minn.), 161 N. W. 148, L. R. A. 1917C, 1140.

99. Harding v. Harding, 140 Cal. 690, reversed, 198 U. S. 317, 25 S. Ct. 679, 49 L. Ed. 1066. See Richards v. Richards, 149 N. Y. S. 1028, 87 Misc. 134.

1. Kelly v. Kelly, 87 S. E. 567. See Pettis v. Pettis, 91 Conn. 608, 101 A. 13.

2. Pearson v. Pearson, 173 N. Y. S. 563.

CHAPTER XXXVIII.

DIVISION OF PROPERTY.

SECTION 1868. Power to Divide Property.
1869. When Divorce Denied.
1870. Agreements of Parties.
1871. Restoration of Property.
1872. Recovery of Dower.
1873. Considerations Determining Division.
1874. Land in Another State.

§ 1868. Power to Divide Property.

The court may by statute be given power to adjust property rights between the spouses on awarding divorce,[3] but not where there is no community property and the wife has contributed nothing.[4]

Under a statute authorizing the court to order alimony or to divide the husband's estate and give the wife a share on a decree for divorce to her, the court cannot do both. A decree awarding the wife $25 a month is plainly an attempt to award alimony, and where the decree also awards the wife the personal effects and a life estate in the homestead, this is a division of his estate, and the decree is therefore irregular. Where the husband, however, pays the alimony during his life, and dies, this matter thereupon need not be further considered, and the court upholds the life estate in the wife as a division of his estate under the statute.[5]

We may add, in general, that recent legislation affects this whole subject in many parts of the United States; so that either in connection with a decree for alimony or without it, that court which, in the proper exercise of jurisdiction, divorces the party

3. Carr v. Carr (Cal. App.), 177 P. 856; Broad v. Broad, 207 Ill. App. 253; Stanton v. Stanton (Mich.), 163 N. W. 873; Fitzpatrick v. Fitzpatrick (Wash.), 177 P. 790 (including separate as well as community property).

4. Tremper v. Tremper (Cal. App.), 177 P. 868.

5. Steinkopf v. Steinkopf, 165 Wis. 224, 161 N. W. 757, 1 A. L. R. 1103.

from bonds of matrimony, makes partition of the property of the spouses with the design of making for the spouses and their children just and equitable provision.[6]

§ 1869. When Divorce Denied.

It is constitutional to make an equitable division although divorce be denied.[7] Under a statute permitting the court on refusing a divorce to divide the property of the parties on good cause shown, the court may properly do so where the property is the joint accumulation of both parties and the woman had worked hard and aided the man in accumulating it.[8]

§ 1870. Agreements of Parties.

Where parties on divorce make an agreement as to disposition of property it cannot be repudiated,[9] but the agreement should be incorporated in the decree to be binding.[10]

§ 1871. Restoration of Property.

The court may on ordering divorce order the property of each party restored to him,[11] even where the wife obtains a limited divorce,[12] but where the decree is granted to the husband for the

6. Whetstone v. Coffey, 48 Tex. 269; Gholston v. Gholston, 54 Ga. 285; Fitch v. Cornell, 1 Sawyer, 156.

7. Putnam v. Putnam (Kan.), 177 P. 838.

8. Jones v. Jones (Okla.), 164 P. 463, L. R. A. 1917E, 921.

9. Duncan v. Duncan (Cal.), 167 P. 141; Eller v. Eller, 198 Ill. App. 411; Kuebler v. Kuebler, 204 Ill. App. 256.

10. Bergevin v. Bergevin (Wis.), 170 N. W. 820.

11. Spurlock v. Spurlock, 80 Ark. 37, 96 S. W. 753; Price v. Price, 127 Ark. 506, 192 S. W. 893; Viser v. Bertrand, 16 Ark. 296; Luick v. Luick, 132 Ia. 302, 109 N. W. 783; Davis v. Davis, 165 Ky. 115, 176 S. W. 955; Harris v. Harris, 31 Ky. Law Rep. 930, 104 S. W. 387; Dunn v. Dunn (Ky.), 210 S. W 943 (restoring property of husband to him where he obtains divorce); Eversole v. Eversole's Adm'x, 169 Ky. 234, 183 S. W. 494 (insurance money paid by wife); Duvall v. Duvall, 147 Ky. 426, 144 S. W. 78; Reed v. Reed, 109 Md. 690, 72 A. 414; Fiedler v. Fiedler, 147 P. 769; Belmont v. Belmont, 82 Ore. 612, 162 P. 830; Railsbach v. Railsbach (Ore.), 182 P. 131 (money loaned by wife to husband). See Pope v. Pope, 148 Ky. 30, 146 S. W. 410. See Rice v. Rice, 23 La. Ann. 518.

12. Phillips v. Phillips, 173 Ky. 608, 191 S. W. 482.

fault of the wife he need not give up his curtesy rights in her property,[13] and an adulterous wife cannot recover property which her husband gave her before he learned of her adultery.[14]

A divorce decree need not adjust indebtedness between the spouses, as under modern statutes these may be enforced by an action at law,[15] and the fact that the separate funds of the wife were employed in the improvement of the husband's lands does not create a trust in the land in her favor,[16] but the wife may be subrogated to the rights of a mortgagee of her husband's property where she has paid the mortgage.[17]

A statute providing for restoration of property does not apply to land which the husband conveys to his wife or has conveyed to her for the purpose of defrauding his creditors. Equity will not aid one who has committed a fraud, and it matters not whether the creditor was actually injured or not, if as a matter of fact the debtor makes a conveyance for the purpose of defrauding his creditors.[18]

§ 1872. Recovery of Dower.

Under statutes in some States a woman who obtains a divorce for the fault of her husband can recover dower as though he were dead,[19] or the court may in some States by statute extinguish the contingent right of dower.[20]

13. Allen v. Allen, 43 Conn. 419; Becklenberg v. Becklenberg, 102 Ill. App. 504; Dollins v. Dollins, 26 Ky. Law Rep. 1036, 83 S. W. 95.

14. Thomas v. Thomas, 27 Okla. 784, 109 P. 825.

15. Barrow v. Barrow (Cal. App.), 183 P. 364.

16. Thrift v. Thrift, 54 Mont. 463, 171 P. 272.

17. Spurlock v. Spurlock, 80 Ark. 37, 96 S. W. 753.

18. Coleman v. Coleman, 147 Ky. 383, 144 S. W. 1, 39 L. R. A. (N. S.) 193; Lankford v. Lankford (Ky.), 117 S. W. 962; Honaker v. Honaker (Ky.), 206 S. W. 12.

19. White v. Warren, 214 Mass. 204, 100 N. E. 1103; Rea v. Rea, 63 Mich. 257, 29 N. W. 703; Orth v. Orth, 69 Mich. 158, 37 N. W. 67; Moross v. Moross, 132 Mich. 203, 93 N. W. 247. 9 Det. Leg. N. 569; Walton v. Walton, 57 Neb. 102, 77 N. W. 392; Emigrant Sav. Bank v. Regan, 58 N. Y. S. 693, 41 App. Div. 523; Poillon v. Poillon, 76 N. Y. S. 488, 37 Misc. 729; Julier v. Julier, 62 Ohio St. 90, 56 N. E. 661, 78 Am. St. R. 697.

20. Gum v. Gum, 122 Va. 32, 94 S. E. 177.

§ 1873. Considerations Determining Division.

Under some modern statutes the court is empowered to divide the property of the spouses equitably between them on divorce,[21] and the court may inquire beyond the name in which the property was taken,[22] and may divide the property equally when accumulated by their joint efforts.[23]

The legislative right to a portion of the guilty spouse's property is sometimes peremptory in favor of an innocent spouse of either sex,[24] and in making division misconduct of the parties may be considered,[25] but the court is not bound to give a larger share to the party not in fault than to the other.[26]

A decree in divorce should and will be presumed to include all the rights of the parties *inter se*. The fact that the husband had communicated to the wife a venereal disease is a proper subject of investigation in a divorce decree in determining the distribution of property, and it will be presumed that it was so investigated and considered, and therefore the wife is barred from making any further claim on account of it.[27]

Where the life estate in a dwelling awarded to the wife is worth

21. Milekovich v. Quinn (Cal. App.), 181 P. 256; Nave v. Nave (Cal. App.), 169 P. 253; Carter v. Carter, 283 Ill. 324, 119 N. E. 269; Eller v. Eller, 198 Ill. App. 411; Foote v. Foote, 103 Kan. 279, 173 P. 290; VanHorn v. VanHorn (Mich.), 165 N. W. 639; Clark v. Clark (Mich.), 165 N. W. 611; Lietzau v. Lietzau (Mich.), 163 N. W. 874; Doutt v. Doutt (Okla.), 175 P. 740; Thompson v. Thompson (Okla.), 173 P. 1037 (property acquired jointly); Rolater v. Rolater (Tex. Civ. App.), 198 S. W. 391 (prorating insurance premium on wife's furniture and house); Folsom v. Folsom (Wash.), 179 P. 847; Quient v. Quient (Wash.), 177 P. 779; Thompson v. Thompson (Wash.), 171 P. 1005; Martin v. Martin, 167 Wis. 255, 167 N. W. 304.

22. Putnam v. Putnam (Kan.), 177 P. 838.

23. Van Vleet v. Van Vleet (N. D.), 174 N. W. 213.

24. Wetmore v. Wetmore, 5 Ore. 469; Wilke v. Wilke, 28 Wis. 296.

The husband, under our statutes, may recover, after divorce, for valuable improvements, etc., on his wife's real estate for which it was originally understood that she would be responsible. Blake v. Blake, 64 Me. 177.

25. Roder v. Roder (Wis.), 169 N. W. 307.

26. Fitzpatrick v. Fitzpatrick (Wash.), 177 P. 790.

27. Schultz v. Christopher, 65 Wash.

no more than the cost of its upkeep she should be awarded the fee,[28] but a decree in divorce awarding to the wife the "use, benefit and possession" of certain land until further order of the court, and that the husband shall convey the land to the wife, and if he fails to do so the decree shall stand as a conveyance, is not enough to give the wife a fee where no further order of the court is made.[29]

In the absence of evidence that there is community property the court will presume that there is none.[30]

§ 1874. Land in Another State.

It is the general rule in this country that a court in one State cannot create equitable rights in land in another State even in a divorce decree,[31] but there is some authority that a court can order a defendant in a divorce case to convey to his wife lands in another State if the defendant is personally served with process.[32] So where the defendant is ordered by the court of one State to convey to the libellant his land in another State in satisfaction of alimony, and the defendant conveys this land to third parties with notice this conveyance may be set aside as in fraud of creditors.[33]

Where the husband abandoned his family, who continued their residence in the State and went to another State and there obtained a divorce by service by publication without any actual notice or knowledge of his wife or appearance by her in court, that court is without jurisdiction to affect by its decree the rights his

496, 118 P. 629, 38 L. R. A. (N. S.) 780.

28. Freeburn v. Freeburn (Wash.), 182 P. 620.

29. Emmons v. Emmons (Mich.), 165 N. W. 753, L. R. A. 1918B, 866.

30. Weyer v. Weyer (Cal. App.), 182 P. 776.

31. Fall v. Fall, 75 Neb. 104, 106 N. W. 412, 113 N. W. 175; Bullock v. Bullock, 52 N. J. Eq. 561, 30 A. 676.

32. Matson v. Matson (Ia.), 173 N. W. 127; Mallette v. Sheerer, 164 Wis. 415, 160 N. W. 182. See learned discussion of this question in 17 Mich. Law Rev. 527, and in 33 Harvard Law Review, 423. As to effect of foreign divorce on land in another State, see further *ante* §§ 1761, 1863, *post* § 1975.

33. Mallette v. Carpenter (Wis.), 160 N. W. 182.

wife and family had acquired in the property he may have owned in the State where they remained. Therefore they retained their rights of homestead, and he may not maintain ejectment to dispossess them of the homestead.[34]

34. Gooch v. Gooch (Okla.), 133 P. 242, 47 L. R. A. (N. S.) 480.

CHAPTER XXXIX.

CUSTODY OF CHILDREN; JURISDICTION.

SECTION 1875. The Custody of the Offspring.
1876. Power to Award Custody of Children.
1877. Power to Award Custody Without Service on Parent.
1878. Jurisdiction of Child.
1879. Removal of Child From Jurisdiction.
1880. Parties to Proceedings for Custody.
1881. Jurisdiction to Award Custody Based on Pleadings.
1882. Order for Custody When Divorce Denied.
1883. Order for Custody Made After Decree in Divorce.
1884. Agreements Between Parties as to Custody.

§ 1875. The Custody of the Offspring.

Another ancillary procedure of great delicacy in a divorce suit relates to the custody of the minor offspring. The court here exercises discretion, as generally in the chancery award of custody; the power being often reserved to open, alter, and modify the decree of divorce in this respect from time to time. There may be temporary custody besides the more permanent award. Children of fourteen and upwards should be consulted as to their wishes, though such wish is not conclusive; while as for those younger, and, most of all, offspring of tender age, the court will exercise ample direction; the true interest of each child furnishing the main principle for judicial guidance. Fault of the one or the other spouse, and the obvious unfitness of either or both to be guardian of the child's morals or maintenance, are considerations; so is the sex of the child. An equal, or nearly equal, division of the offspring is appropriate where blame is not great on either side: tender infants and young girls to the mother, boys to the father. The common-law preference of father to mother; an award, perhaps, so that each parent may have access — all these furnish suggestions, variable according to the circumstances, and

calling for both a humane and just exercise of this painful judicial discretion.[35]

§ 1876. Power to Award Custody of Children.

The divorce court commonly has jurisdiction over the custody of minor children,[36] and is not bound by a previous judgment of

35. See, upon this subject more generally, Parent & Child, *ante* § 740 *et seq.* As to the decree and its modification which legislation frequently defines. Harvey v. Lane, 66 Me. 536; Sullivan v. Learned, 49 Ind. 252; Welch v. Welch, 33 Wis. 535; Chandler v. Chandler, 24 Mich. 176. As to unfitness of either parent, Brandon v. Brandon, 14 Kan. 342; Bennett v. Bennett, 43 Conn. 342; Boggs v. Boggs, 49 Ia. 190. As to access of both parents, see Latham v. Latham, 30 Gratt. 307; Burge v. Burge, 88 Ill. 164; Campbell v. Campbell, 37 Wis. 206; English v. English, 32 N. J. Eq. 738; Hill v. Hill, 44 Md. 450. And on other points of the text, Draper v. Draper, 68 Ill. 17; McKim v. McKim, 12 R. I. 462; McShan v. McShan, 56 Miss. 413. A stranger should not be taken. Hopkins v. Hopkins, 39 Wis. 167. Welfare of a young child is a paramount consideration, and there are strong reasons why an infant daughter should remain with her mother. Anonymous, 55 Ala. 428. Right to services of child and obligation to maintain appear to go together, so that where complete custody is given to the mother, the father becomes relieved of the common-law liability for the child's maintenance. Husband v. Husband, 67 Ind. 583.

36. Bancroft v. Bancroft (Cal.), 173 P. 582; McKay v. Superior Court, 120 Cal. 143, 52 P. 147, 40 L. R. A. 585; *Ex parte* Saul, 31 Cal. App. 382, 160 P. 695; People v. Champion, 30 Cal. App. 463, 158 P. 501; Russell v. Russell, 20 Cal. Ap. 457, 129 P. 467; Morill v. Morrill, 83 Conn. 479, 77 A. 1 (involving absence from the State); Baker v. Baker, 89 A. 131; Johnson v. Johnson, 131 Ga. 606, 62 S. E. 1044; Williams v. Crosby, 118 Ga. 296, 45 S.E. 282; Scott v. Cohn, 134 Ill. App. 195, judg. aff'd., Cohn v. Scott, 231 Ill. 556, 83 N. E. 191 (not by independent investigation made by him); Musselman v. Musselman, 44 Ind. 106; Kendall v. Kendall, 5 Kan. App. 688, 4 P. 940; Stone v. Duffy, 219 Mass. 178, 106 N. E. 595 (to mother though she be in fault); Austin v. Austin, 173 Mich. 47, 138 N. W. 237; *In re* Morgan, 117 Mo. 249, 21 S. W. 1122, 22 S. W. 913; *In re* Krauthoff, 191 Mo. App. 149, 177 S. W. 1112; Robinson v. Robinson, 168 Mo. App. 639, 154 S. W. 162, 186 S. W. 1032; Wagner v. Wagner, 6 Mo. App. 573 (memorandum); *In re* Kohl, 82 Mo. App. 442; *In re* De Saulles, 167 N. Y. S. 445, 101 Misc. 447; Cleveland Protestant Orphan Asylum v. Soule, 5 Ohio App. 67; Houghton v. Houghton, 37 S. D. 184, 157 N. W. 316; *Ex parte* Ellerd (Tex. Cr. App.), 158 S. W. 1145; Badolato v. Badolato (Wash.), 176 P. 24; Dyer v. Dyer, 65 Wash. 535, 118 P. 634.

another court between the same parties[37] as the conditions of the parties are constantly changing.

§ 1877. Power to Award Custody Without Service on Parent.

The act of the court of the domicile of the mother in awarding to her the custody of the child in a proceeding for divorce without personal service on the father is not a deprivation of his property within the Fourteenth Amendment. The right of custody of the father of his child is not a property right. The father is the natural guardian, but for nurture only, he is the trustee for the child, to protect, rear and train it for the duties of life. Incidentally he is entitled to its reasonable services. But he has no property right in the child. He cannot compel it to do service for another. If the right to custody were a property right the father could not be deprived of it without compensation, but the courts have full right to award the custody to the mother.[38]

The court may have jurisdiction to ward custody even though the father is not domiciled in the State and the mother forcibly brings the child in the State to give the court jurisdiction.[39]

§ 1878. Jurisdiction of Child.

Where the court has jurisdiction of the parties it has power to award custody of the children, although they may not be in the jurisdiction at the time,[40] and are not brought personally before

It is the duty of the court, and not the jury, to award the custody of the minor children. Cureton v. Cureton, 132 Ga. 745, 65 S. E. 65.

In a divorce suit, so far as the children are concerned, the court, under the statute, can make orders only concerning their custody pending the suit or upon granting a divorce. Thomas v. Thomas (1911), 250 Ill. 354, 95 N. E. 345, rev. judg. (1910) 155 Ill. App. 619.

37. Zachry v. Zachry, 140 Ga. 479, 79 S. E. 115.

38. Kenner v. Kenner, 139 Tenn. 211, 201 S. W. 779, L. R. A. 1918E, 587.

39. White v. White, 77 N. H. 26, 86 A. 353.

40. Power v. Power, 65 N. J. Eq. 93, 55 A. 111; State v. Rhoades, 29 Wash. 61, 69 P. 389. See Willson v. Willson, 146 P. 615, judg. mod. 86 Wash. 50, 149 P. 328.

the court,[41] but the court has no power to award custody of a child residing in another State.[42]

The children of American citizens remain subject to the jurisdiction of the court notwithstanding the mother's marriage to a foreigner, and the children may remain wards of the court.[43]

The domicile of an infant is of importance where its property rights are concerned, but not in a divorce case where the welfare of the child is the controlling consideration as to its custody. So when the child has been awarded to the mother by a court where the mother resides, and the child happens to be found in the State of the father's domicile, that court is not bound to restore possession of the child to him as a matter of right.[44]

§ 1879. Removal of Child from Jurisdiction.

The court may forbid the removal of the child from the jurisdiction,[45] or may permit the removal of the child from the jurisdiction where that seems best for the child,[46] and the court's jurisdiction to award custody is not ousted by removal of the child from beyond the State.[47]

Where a non-resident father is found to be respectable and honest and a business man of standing, and is awarded the custody of his child during three months of each year, the court should not require him to give bond as a condition for allowing him to take the child out of the State.[48]

41. Mollring v. Mollring (Ia.), 167 N. W. 524.

42. Thrift v. Thrift, 54 Mont. 463, 171 P. 272.

43. Gillett v. Bryant, 203 Ill. App. 322.

44. Kenner v. Kenner, 139 Tenn. 211, 201 S. W. 779, L. R. A. 1918E, 587.

45. Wald v. Wald, 168 Mo. App. 377, 151 S. W. 786; *Ex parte* Ellerd (Tex. Cr. App.), 153 S. W. 1145.

46. Weatherton v. Taylor, 124 Ark. 579, 187 S. W. 450.

47. *In re* Krauthoff, 191 Mo. App. 149, 177 S. W. 1112.

48. Parrish v. Parrish (Va.), 82 S. E. 119, L. R. A. 1915A, 576.

§ 1880. Parties to Proceedings for Custody.

In a proceeding by the parent to obtain custody of the child the child is not a proper party.[49]

§ 1881. Jurisdiction to Award Custody Based on Pleadings.

The pleadings should contain a prayer for custody of the children,[50] although it is not always necessary,[51] and the court has no authority to proceed in questions not covered by the pleadings, and cannot, for example, change the custody of children on a petition by the mother to order the father to contribute to their custody.[52]

Where a petition for divorce is silent concerning the existence or custody of children, and a cross-bill is filed asking for the custody of the children and not seeking a divorce, the court has no right to refuse to dismiss the original bill at the request of the libellant for the purpose of retaining jurisdiction as to custody of the children. A defendant will not be permitted to file a cross-bill for a purpose which is equally available by an answer, and as all questions regarding custody could have been raised by an answer the cross-bill should be dismissed.[53]

Indeed, alimony, the custody of offspring, and certain other matters branch out of a divorce suit as proceedings purely ancillary to the main issue, distinct, and yet often quite comprehensive of themselves. Jurisdiction of divorce courts for awarding custody of the children is purely of statutory or chancery origin, and ecclesiastical courts never exercised it.

§ 1882. Order for Custody When Divorce Denied.

It is often held in this country that the court cannot make

49. Kenner v. Kenner, 139 Tenn. 211, 201 S. W. 779, 139 Tenn. 700, 202 S. W. 723.

50. Vine v. Vine, 12 Cal. App. 458, 107 P. 702 (mention of children in count not sustained may be enough); Wells v. Wells, 11 App. D. C. 392; Mitchell v. Mitchell, 28 Nev. 110, 79 P. 50.

51. Logan v. Logan, 90 Ind. 107.

52. Graham v. Graham (Tenn.), 204 S. W. 987.

53. Thomas v. Thomas, 250 Ill. 354, 95 N. E. 345, 35 L. R. A. (N. S.) 1158.

decrees concerning the custody of children where a divorce is denied, but can do so only during the pendency of the suit or upon a final hearing where the divorce is decreed, as jurisdiction in divorce is statutory in this country.[54] It seems to be the modern rule, however, that the custody of the children can be granted to one of the parties where a divorce is denied, but these decisions rest either upon a statute conferring such power or upon supposed general equity powers of the court,[55] as where both parties are equally in the wrong.[56]

The early decisions which held in accordance with the former common-law rule, that the court could not give the custody of the children to the mother and require the father to provide for their support, except as an incident to a decree of divorce or of separation, are not in harmony with the present state of the law; and the decisions which, by construction, restricted the operation of statutory provisions containing no restrictive terms to cases in which statutory grounds for a separation had been established, have lost much of their persuasive force. It is now settled that the court, under its general equitable powers and without statutory

54. Brenot v. Brenot, 102 Cal. 294, 36 P. 672; Keppel v. Keppel, 92 Ga. 506, 17 S. E. 976; Thomas v. Thomas, 250 Ill. 354, 95 N. E. 345, revg. judg. (1910), 155 Ill. App. 619, 35 L. R. A. (N. S.) 1158; Garrett v. Garrett, 114 Ia. 439, 87 N. W. 282; Mollring v. Mollring (Ia.), 167 N. W. 524; Murray v. Murray (Md.), 107 A. 550; King v. King, 42 Mo. App. 454; Redding v. Redding (N. J. Eq.), 85 A. 712; Davis v. Davis, 75 N. Y. 221; Simon v. Simon, 159 N. Y. 549, 54 N. E. 1094; Robinson v. Robinson, 131 N. Y. S. 260, 146 App. Div. 533, revg. decree (1910), 125 N. Y. S. 1064, 69 Misc. 438; Lord v. Lord, 80 W. Va. 547, 92 S. E. 749. See Bensen v. Bensen, 20 Cal. App. 462, 129 P. 596.

55. Cornelius v. Cornelius, 31 Ala. 428; Anonymous, 55 Ala. 428; Horton v. Horton, 75 Ark. 22, 86 S. W. 824; *Ex parte* Cooper, 86 Kan. 573, 121 P. 334; Hoskins v. Hoskins, 28 Ky. Law Rep. 435, 89 S. W. 478 (where husband drank); Knoll v. Knoll, 114 La. 703, 38 So. 523 (where parties living apart by agreement); Satterwhite v. Satterwhite (La.), 80 So. 547; Jacobs v. Jacobs, 136 Minn. 190, L. R. A. 1917D, 971, 161 N. W. 525; Power v. Power, 65 N. J. Eq. 93, 55 A. 111 (desertion by agreement); Light v. Light, 108 N. Y. S. 931, 124 App. Div. 567; Defee v. Defee (Tex. Civ. App.), 51 S. W. 274; Penn v. Penn (Wis.), 169 N. W. 558.

56. *Ex parte* Cooper, 86 Kan. 573, 121 P. 334; Robinson v. Robinson, 125 N. Y. S. 1064, 69 Misc. 438.

authority, may provide for a separate maintenance for the wife and her children, although she seeks neither a divorce nor a decree of separation, if she establishes a legal cause for living separate and apart from her husband.

It is also settled that if a divorce be granted for the misconduct of the husband, and the custody of the children be awarded to the wife without any provision concerning their support, the obligation of the husband to support them still continues and may be enforced in a separate action.

It is also settled in all jurisdictions that if for any reason a husband and wife have in fact separated and are living apart, the court, when its power is invoked by *habeas corpus* proceedings, may determine which parent shall have custody of the children, and that the court in such cases will place the interests of the children above the rights of either parent, and will make such provision for their care and custody as will best secure their future welfare.[57]

§ 1883. Order for Custody Made After Decree in Divorce.

While the order for custody of the children will properly be made in the final decree for divorce,[58] still it may sometimes be made later,[59] and a supplementary decree may be entered with respect to the custody of the child although the original decree made no reference to it.[60]

§ 1884. Agreements Between Parties as to Custody.

The court in ordering custody of the children is not bound by an agreement between the parties,[61] but such an agreement may be

57. Jacobs v. Jacobs (Minn.), 16[illegible] N. W. 525, L. R. A. 1917D, 971.

58. Shattuck v. Shattuck, 135 Cal. 192, 67 P. 45; *In re* Culp, 2 Cal. App. 70, 83 P. 89; Hall v. Hall, 141 Ga. 361, 80 S. E. 992.

59. Alderson v. Alderson's Guardian, 113 Ky. 830, 69 S. W. 700, 24 Ky. Law Rep. 595; Auer v. Auer (Mo. App.), 193 S. W. 926; Shannon v. Shannon, 97 Mo. App. 119, 71 S. W. 104; Sanders v. Sanders, 167 N. C. 317, 83 S. E. 489; Catlin v. Catlin (N. Y. Sup. 1884), 31 Hun, 632; Miller v. Miller, 67 Ore. 359, 136 P. 15.

60. Chambers v. Chambers, 75 Neb. 850, 106 N. W. 993.

61. Bailey v. Bailey, 157 Ill. App.

given effect by the court provided its terms are reasonable,[62] and such an agreement gives the court power to make such a decree,[63] and will be construed in accordance with its evident intention,[64] and where one party fails to keep the agreement the other may rescind it and apply to the court for relief.[65]

74; Slattery v. Slattery, 139 Ia. 419, 116 N. W. 608; Lowrey v. Lowrey, 108 Ga. 766, 33 S. E. 421; Carpenter v. Carpenter, 171 Mich. 572, 137 N. W. 250; Gittings v. Gittings (Mich.), 163 N. W. 900; Badolato v. Badolato (Wash.), 176 P. 24 (when change of conditions arises). See Parsons v. Parsons, 23 Ky. Law Rep. 223, 62 S. W. 719.

62. Slattery v. Slattery, 139 Ia. 419, 116 N. W. 608; McGaw v. O'Beirne, 126 La. 584, 52 So. 775; Buseman v. Buseman (W. Va.), 98 S. E. 574 (agreement with stranger for custody).

63. Stone v. Bayley, 75 Wash. 184, 134 P. 820.

64. Young v. Young (Ia.), 162 N. W. 617 (as to college education for girl); Kane v. Kane, 53 Mont. 519, 165 P. 457.

65. Auer v. Auer (Mo. App.), 193 S. W. 926.

CHAPTER XL.

CUSTODY OF CHILDREN; GROUNDS.

SECTION 1885. Discretion of Trial Court.
1886. Welfare of Child the Test.
1887. Domicile of Child.
1888. Fault and Character of Parties.
1889. Preference to Father.
1890. Preference to Parents Over Third Parties.
1891. Preference of Children.
1892. Wealth of Parents.
1893. Age and Health of Children.
1894. Division of Custody.
1895. Access to Child by Parent Deprived of Custody.
1896. Effect of Foreign Decree.

§ 1885. Discretion of Trial Court.

The custody of the children is entirely in the discretion of the court, which will be sustained unless abused,[66] and a judgment of the lower court made as to the custody of the children after talking with them will be reversed only on discovery of very grave errors, as the lower court is in much better position to judge than the appellate court.[67]

66. Simmons v. Simmons, 22 Cal. App. 448, 134 P. 791; Seeley v. Seeley, 30 App. D. C. 191; Dubois v. Johnson, 96 Ind. 6; Slattery v. Slattery, 139 Ia. 419, 116 N. W. 608; Willcox v. Hosmer, 83 Mich. 1, 47 N. W. 29; Waldref v. Waldref (Minn.), 159 N. W. 1068; Chambers v. Chambers, 75 Neb. 850, 106 N. W. 993; Graviess v. Graviess, 28 Ohio Cir. Ct. R. 26; Moore v. Moore (Tex. Civ. App.), 213 S. W. 949; Meyer v. Meyer, 100 Va. 228, 40 S. E. 1038.

Based on legal evidence. While a chancellor has very large discretion in hearings involving the custody of minor children, it must be a judicial discretion and subject to review on evidence heard in open court, and his decision may not be based on investigations made in whole or in part out of court. Cohn v. Scott, 231 Ill. 556, 83 N. E. 191.

67. Mylius v. Cargill (N. M.), 142 P. 918, L. R. A. 1915B, 154.

§ 1886. Welfare of Child the Test.

In awarding the custody of the children the paramount consideration must be their welfare.[68]

The physical, moral, and spiritual welfare of the child is the only safe guide in cases of the custody of the child in divorce proceedings. The love of the mother for her child, regardless of conditions and environments, has been proven by the history of the ages, and while her devotion can be counted upon most unfailingly, it is sad to say that sometimes the tie between father and child is

68. Coleman v. Coleman (Ala.), 73 So. 473; Leak v. Leak, 3 Alaska, 164; Beyerle v. Beyerle (1909), 155 Cal. 266, 100 P. 702; Simmons v. Simmons, 22 Cal. App. 448, 134 P. 791; Seeley v. Seeley, 30 App. D. C. 191; Wells v. Wells, 11 App. D. C. 392; Scott v. Cohn, 134 Ill. App. 195, judg. affd., Cohn v. Scott, 231 Ill. 556, 83 N. E. 191; Pearson v. Pearson, 179 Ill. App. 127; Smith v. Smith, 155 Ill. App. 14; People v. Hickey, 86 Ill. App. 20; Keesling v. Keesling, 42 Ind. App. 361, 85 N. E. 837; Kjellander v. Kjellander, 92 Kan. 42, 139 P. 1013; Davis v. Davis, 140 Ky. 526, 131 S. W. 266; Schhan v. Shehan, 152 Ky. 191, 153 S. W. 243; Colson v. Colson, 153 Ky. 68, 154 S. W. 380; Irwin v. Irwin, 105 Ky. 632, 49 S. W. 432, 20 Ky. Law Rep. 1761; Masterson v. Masterson, 24 Ky. Law Rep. 1352, 71 S. W. 490; Goodridge v. Goodridge, 25 Ky. Law Rep. 649, 76 S. W. 164; Pangle v. Pangle (Md.), 106 A. 337; Wandersee v. Wandersee, 156 N. W. 348; Waldref v. Waldref (Minn.), 159 N. W. 1068; *In re* Krauthoff, 191 Mo. App. 149, 177 S. W. 1112; Tatum v. Davis, 144 Mo. App. 125, 128 S. W. 766; Knepepr v. Knepper, 139 Mo. App. 493, 122 S. W. 1117; Shine v. Shine (Mo. App.), 189 S. W. 403; Waters v. Gray (Mo. App.), 193 S. W. 33; Dimmitt v. Dimmitt, 167 Mo. App. 94, 150 S. W. 1107; Nathan v. Nathan (Neb.), 165 N. W. 955; Welch v. Baker, 83 N. J. Eq. 330, 90 A. 1122; Van Buren v. Van Buren, 78 N. Y. S. 23, 75 App. Div. 615, 11 N. Y. Ann. Cas. 381 (kept where proper school facilities); Lester v. Lester, 165 N. Y. S. 187, 178 App. Div. 205; People v. Multer, 175 N. Y. S. 526; People v. Sinclair, 86 N. Y. S. 539, 91 App. Div. 322; People v. Lawson, 98 N. Y. S. 130, 111 App. Div. 473; Houghton v. Houghton, 37 S. D. 184, 157 N. W. 316; Graham v. Graham (Tenn.), 204 S. W. 987; Smith v. Smith (Tex. Civ. App.), 200 S. W. 1129; *Ex parte* Boyd (Tex. Civ. App.), 157 S. W. 254; Norris v. Norris (Tex. Civ. App. 1898), 46 S. W. 405; Wingard v. Wingard, 56 Wash. 354, 105 P. 833; Kane v. Miller, 40 Wash. 125, 82 P. 177 (to wife who has permanent home rather than to husband who has not where both parties have remarried); Dawson v. Dawson, 57 W. Va. 520, 50 S. E. 613, 110 Am. St. R. 800; Linch v. Harden (Wyo.), 176 P. 156; *Ex parte* Madsen (Wyo.), 169 P. 336.

a different matter, and requires the strong arm of the law to regulate it with some degree of humanity and tenderness for the child's good.[69]

§ 1887. Domicile of Child.

In considering the best interests of the child the domicile of the infant is unimportant, and custody may be awarded to the mother who has the child within the State although the father is a non-resident.[1]

§ 1888. Fault and Character of Parties.

The character of the parties is vital on all questions of the custody of the children,[2] and custody will usually be awarded to the party who is not at fault if otherwise able to care for the children,[3] but the party obtaining a divorce is not entitled to the

69. *Re* Alderman, 157 N. C. 507, 73 S. E. 126, 39 L. R. A. (N. S.) 988.

1. Kenner v. Kenner, 139 Tenn. 211, 201 S. W. 779, 139 Tenn. 700, 202 S. W. 723.

2. Breckenridge v. Breckenridge, 78 Ark. 598, 94 S. W. 715; Brown v. Brown, 71 Kan. 868, 81 P. 199 (wife's reputation for chastity admissible); Crabtree v. Crabtree, 27 Ky. Law Rep. 435, 85 S. W. 211; Weiss v. Weiss, 174 Mich. 431, 140 N. W. 587 (parent's comparative goodness not final); Jones v. Jones, 173 N. C. 279; 91 S. E. 960 (husband a drunkard and immoral); Evans v. Evans (Tenn. Ch. App. 1900), 57 S. W. 367. See Deyette v. Deyette (Vt.), 104 A. 232 (severity of wife not controlling where husband claimed child was illegitimate).

3. Caldwell v. Caldwell, 141 Ia. 192, 119 N. W. 599; Aitchison v. Aitchison, 99 Ia. 93, 68 N. W. 573; Hall v. Hall, 25 Ky. Law Rep. 1304, 77 S. W. 668; Goodspeed v. Goodspeed (Mich.), 170 N. W. 90 (father); Duncan v. Duncan (Miss.), 80 So. 697; *In re* Steele, 107 Mo. App. 567, 81 S. W. 1182 (adulterous wife not given custody even after husband's death but child left with his relatives where able to care for her); Power v. Power, 66 N. J. Eq. 320, 105 Am. St. R. 653; Folkenberg v. Folkenberg, 58 Ore. 267, 114 P. 99; Mills v. Mills, 47 Ore. 246, 83 P. 390; Griffin v. Griffin, 18 Utah, 98, 55 P. 84; Stover v. Stover, 24 Utah, 92, 66 P. 766; Owens v. Owens, 96 Va. 191, 31 S. E. 72. See State *ex rel.* Henry v. Lyons (La.), 71 So. 507 (evidence of wife's adultery taken in divorce suit is not conclusive several years later).

custody of the children as a matter of right,[4] although the fact that a man has some small vices will not prevent him from being given custody of his children.[5]

Where the wife has been granted a divorce the custody will usually be given her, with the right of the husband to visit them at proper times,[6] but custody may be awarded to the mother although the father is awarded a divorce in certain cases.[7]

Where the father is granted a divorce he may be given custody of the child,[8] and custody will be given to the father where the mother has left him and the child and gone to another State for

4. Haskell v. Haskell, 152 Mass. 16, 24 N. E. 859; Freeman v. Freeman, 94 Mo. App. 504, 68 S. W. 389 (where wife deserted husband on account of his inability to support her); Richardson v. Richardson, 36 Wash. 272, 78 P. 920 (husband not entitled to custody where his cruelty drove wife to adultery).

5. Duncan v. Duncan (Miss.), 80 So. 697 (drinking whiskey and playing poker).

6. Anderson v. Anderson, 165 Ala. 181, 51 So. 619; Wann v. Wann, 85 Ark. 471, 108 S. W. 1052; Atkinson v. Atkinson, 178 S. W. 375; Anderson v. Anderson, 152 Ky. 773, 154 S. W. 1; Towles v. Towles, 176 Ky. 225, 195 S. W. 437; Duvall v. Duvall, 147 Ky. 426, 144 S. W. 78; Schnuck v. Schnuck, 163 Ky. 133, 173 S. W. 347; Copping v. Termini, 135 La. 224, 65 So. 132; Klein v. Klein, 47 Mich. 518, 11 N. W. 367; Mackey v. Frenzer, 93 Neb. 584, 141 N. W. 199; Page v. Page, 195 N. Y. 540, 88 N. E. 1127; Israel v. Israel, 77 N. Y. S. 912, 38 Misc. 335; Page v. Page, 108 N. Y. S. 864, 124 App. Div. 421; McNeir v. McNeir, 129 N. Y. S. 481; Graviess v. Graveiss, 28 Ohio Cir. Ct. R. 26; Leon v. Leon, 79 Ore. 347, 155 P. 189; Gustin v. Gustin, 59 Ore. 226, 116 P. 1072; Seigmund v. Seigmund, 46 Wash. 572, 90 P. 913; Guerin v. Guerin, 45 Wash. 486, 88 P. 928.

7. Rieden v. Rieden (Mich.), 173 N. W. 362 (divorce for cruelty); Zerega v. Zerega (Mo. App.), 200 S. W. 700; Jennings v. Jennings, 85 Mo. App. 290 (where he has married again); People v. Winston, 72 N. Y. S. 456, 65 App. Div. 231; Osterhoudt v. Osterhoudt, 62 N. Y. S. 529, 48 App. Div. 74, 7 N. Y. Ann. Cas. 300, affd. 63 N. Y. S. 1113, 49 App Div. 636 (where only charge against mother is her marriage in another State and where she is better qualified to care for them); Ullman v. Ullman, 135 N. Y. S. 1080, 151 App. Div. 419; Coe v. Coe, 75 Ore. 145, 145 P. 674; Holm v. Holm, 44 Utah, 242, 139 P. 937.

8. Cohn v. Scott, 231 Ill. 556, 83 N. E. 191; Hayden v. Hayden, 74 Kan. 725, 88 P. 257; Ashburn v. Ashburn, 101 Mo. App. 365, 74 S. W. 394; Blid v. Blid, 82 Neb. 294, 117 N. W. 700 (taken from wife as she lived in "red light" district); Moyer v. Moyer, 75 N. J. Eq. 439, 72 A. 965;

the purpose of obtaining a divorce,[9] and where the father is granted a divorce for adultery of the mother, who marries her paramour as soon as possible after the decree, the custody will be granted to him.[10]

Where the husband married the wife to end a prosecution against him, and he subsequently obtains a divorce against her for desertion, she will be granted the custody of the children.[11]

The subsequent remarriage of one of the parties does not make or impair his fitness for custody of the children, although he married in violation of an order against remarriage.[12]

In a contest between parents for the possession of a child, witnesses should not be permitted to testify that one or the other of the parties is an unfit and improper person, or that the interest of the child will be best subserved by giving it to one of the contending parties. Evidence touching the character, conduct, and reputation of either of the parties, or any other evidence tending to throw light on their fitness to be the custodian of the child, is admissible; but conclusions deducible from this testimony are not the subject-matter of opinion by the witnesses.[13]

§ 1889. Preference to Father.

Under the early common law the father was entitled to the custody of the children as against the mother under almost all circumstances, and the cases were few and exceptional in which their custody could be given to her, although she lived apart from her husband on account of his misconduct. The rule governing these

Penn v. Penn, 37 Okla. 650, 133 P. 207; Dorsey v. Dorsey (Utah), 172 P. 722; Cozard v. Cozard, 48 Wash. 124, 92 P. 935.

9. Rose v. Rose, 90 Ark. 16, 117 S. W. 752; Page v. Page, 166 N. C. 90, 81 S. E. 1060; McGown v. McGown, 46 N. Y. S. 285, 19 App. Div. 368, affd. 164 N. Y. 558, 58 N. E. 1089.

10. Smith v. Frates (Wash.), 180 P. 880.

11. Alderson v. Alderson's Guardian, 113 Ky. 830, 69 S. W. 700, 24 Ky. Law Rep. 595.

12. Lester v. Lester, 165 N. Y. S. 187, 178 App. Div. 205.

13. Milner v. Gatlin, 143 Ga. 816, 85 S. E. 1045, L. R. A. 1916B, 977.

relations has been gradually changing until now the rule giving the father the custody of the children as against the mother has been entirely abrogated in most States and they are now usually on an equal footing.[14]

The doctrines of the common law have, however, still some influence, and where the claims of the parties are equal it is often said that the father's rights to the custody of the children are paramount.[15] So the paramount right of the father to custody of the children where he is granted a divorce must be considered, outweighing the wishes of the children,[16] but the father's technical legal right to their services is outweighed by the consideration of their paramount welfare.[17]

§ 1890. Preference to Parents Over Third Parties.

The natural and legal rights of the parents will be sustained unless some good reason to the contrary appears,[18] although the court may, where neither party is fit, award custody to an outsider.[19] The mother has the preference over the paternal grandmother, other things being equal,[20] although custody may be properly given to the mother pending the proceedings where it appears they will be properly cared for.[21]

Where a child is stolen by the father from the mother after a divorce between the parties, and the mother fails to find the child

14. Jacobs v. Jacobs (Minn.), 161 N. W. 525, L. R. A. 1917D, 971.

15. Baker v. Durham, 95 Ark. 355, 129 S. W. 789; Brenneman v. Hildebrandt, 137 Mo. App. 82, 119 S. W. 452; Denny v. Denny, 86 S. E. 835.

16. Edwards v. Edwards, 23 Ky. Law Rep. 1051, 64 S. W. 726; Buseman v. Buseman (W. Va.), 98 S. E. 574.

17. Duncan v. Duncan (Miss.), 80 So. 697; Kenner v. Kenner, 139 Tenn. 211, 201 S. W. 779, 139 Tenn. 700, 202 S. W. 723.

18. Buseman v. Buseman (W. Va.), 98 S. E. 574.

19. Keesling v. Keesling, 42 Ind. App. 361, 85 N. E. 837; Collins v. Collins, 76 Kan. 93, 90 P. 809; Bottom v. Bottom, 143 Ky. 666, 137 S. W. 198; Burton v. Burton (Ky.), 211 S. W. 869; Noble v. Noble (Tex. Civ. App.), 185 S. W. 318.

20. Gillett v. Bryant, 203 Ill. App. 322.

21. Ratcliffe v. Ratcliffe (Minn.), 160 N. W. 778.

for some years, although she makes diligent search, and the child is meanwhile adopted by another woman of excellent character, who brings him up, the natural mother, on finding the child, is entitled to his custody unless it appears that she is not a fit person to care for him. The presumption is that the child will be better cared for by his own parents than by strangers, and therefore it is incumbent on the stranger to show to the contrary if he would retain the custody of the child under this rule. The fact that the child prefers to remain with his foster parent is not governing, as a boy cannot be allowed at pleasure to abandon his filial duties and select elsewhere a home more agreeable either to his desires or his worldly interests.[22]

§ 1891. Preference of Children.

The preference of the children may be considered in a doubtful case,[23] but a statute giving children the right to choose with which parent they shall live is not conclusive, and the court may order otherwise.[24]

§ 1892. Wealth of Parents.

The wealth of the father[25] and the poverty of the mother are not determining factors,[26] but children may be awarded to the father, if a suitable person, where he is financially able to care for them and the mother is not.[27]

The fact that the father is earning money and the mother is not, and that the father of the father is richer than the father of the mother, are not controlling circumstances as to the custody of the

22. Focks v. Munger (N. M.), 149 P. 300, L. R. A. 1915E, 1019.

23. Shallcross v. Shallcross, 135 Ky. 418, 122 S. W. 223; Burton v. Burton (Ky.), 211 S. W. 869; Randall v. Randall (Miss. 1900), 28 So. 19; Million v. Million, 106 Mo. App. 680; Johnson v. Johnson (Tex. Civ. App. 1907), 102 S. W. 943.

24. Dorsey v. Dorsey (Utah), 172 P. 722.

25. McKay v. McKay, 77 Ore. 14, 149 P. 1032.

26. Reitmann v. Reitmann, 168 Ky. 830, 183 S. W. 215.

27. Duncan v. Duncan (Miss.), 80 So. 697.

child of a divorced couple where it appears that the mother, through the aid of her father and brother, is furnishing and may be expected to furnish indefinitely all necessary care and comfort for the child.[28]

§ 1893. Age and Health of Children.

It is proper for the court in doubtful cases to award the custody of the older children to the father,[29] and the infants and younger children to the mother,[30] especially if the child is of delicate health,[31] and daughters will more naturally be awarded to the mother.[32]

§ 1894. Division of Custody.

Custody of children is frequently divided, giving to one parent for part of the year and to another for the balance,[33] or where there is more than one child some may be given to each parent.[34]

28. Kenner v. Kenner, 139 Tenn. 211, 201 S. W. 779, L. R. A. 1918E, 587.

29. Beene v. Beene, 64 Ark. 518, 43 S. W. 968; Irwin v. Irwin, 105 Ky. 632, 49 S. W. 432, 20 Ky. Law Rep. 1761; People v. Lawson, 98 N. Y. S. 130, 111 App. Div. 473.

30. Meffert v. Meffert, 177 S. W. 1; Gillett v. Bryant, 203 Ill. App. 322; People v. Hickey, 86 Ill. App. 20; Wills v. Wills, 168 Ky. 35, 181 S. W. 619; Hayden v. Hayden, 167 Ky. 569, 180 S. W. 961; Pope v. Pope, 161 Ky. 104, 170 S. W. 504; Caudill v. Caudill, 172 Ky. 460, 189 S. W. 431; Masterson v. Masterson, 20 Ky. Law Rep. 631, 46 S. W. 20; Fletcher v. Fletcher, 21 Ky. Law Rep. 1302, 54 S. W. 953; Baurens v. Giroux, 123 La. 879, 49 So. 605; Hazelton v. Hazelton, 17 Det. Leg. N. 516, 127 N. W. 297; Hauber v. Hauber, 170 Mo. App. 71, 156 S. W. 54; Fisher v. Fisher (Mo. App.), 207 S. W. 261; Boxa v. Boxa, 92 Neb. 78, 137 N. W. 986; Trimble v. Trimble, 97 Va. 217, 33 S. E. 531; Smith v. Frates (Wash.), 180 P. 880 (especially girls); Smith v. Smith, 15 Wash. 237, 46 P. 234. See Burton v. Burton (Ky.), 211 S. W. 869 (12 year old daughter awarded to father where mother too ill to care for her).

31. Barlow v. Barlow, 28 Ky. Law Rep. 664, 90 S. W. 216, 28 Ky. Law Rep. 1014, 90 S. W. 1055.

32. Kennedy v. Kennedy, 182 S. W. 100; Abele v. Abele, 62 N. J. Eq. 644, 50 A. 686.

33. Wallace v. Wallace, 26 S. D. 229, 128 N. W. 143 (for children at school).

34. Nave v. Nave (Cal. App.), 169 P. 253.

Where the divorce is denied the court may leave the custody of three of the children with the mother, who is properly taking care of them.[35] Young children should ordinarily not be separated.[36]

§ 1895. Access to Child by Parent Deprived of Custody.

The court may properly, in awarding custody of the children to one parent, order that the other shall have the right to visit them at stated times or periods,[37] and unless the order forbids it the parent who is not given custody will have a right of visitation as a matter of course,[38] but where the husband has not paid the alimony ordered the court may refuse to enforce an order allowing him the right of visitation.[39]

35. Satterwhite v. Satterwhite (La.), 80 So. 547.

36. Smith v. Frates (Wash.), 180 P. 880.

37. De Reitmatter v. De Reitmatter, 75 Ark. 193, 87 S. W. 87; Schnuck v. Schnuck, 163 Ky. 133, 173 S. W. 347; McQueary v. McQueary (Ky.), 205 S. W. 769 (error to deny father right to visit children); Davis v. Davis, 140 Ky. 526, 131 S. W. 266; Shehan v. Shehan, 152 Ky. 191, 153 S. W. 243; Burton v. Burton (Ky.), 211 S. W. 869; Irwin v. Irwin, 105 Ky. 632, 49 S. W. 432, 20 Ky. Law Rep. 1761; Bristow v. Bristow, 21 Ky. Law Rep. 585, 52 S. W. 818, denying petition for rehearing 21 Ky. Law Rep. 481, 51 S. W. 819; Edwards v. Edwards, 23 Ky. Law Rep. 1051, 64 S. W. 726; Baker v. Baker, 27 Ky. Law Rep. 533, 85 S. W. 729; Barlow v. Barlow, 28 Ky. Law Rep. 664, 90 S. W. 216, 28 Ky. Law Rep. 1014, 90 S. W. 1055; Smith v. Smith (Mo. App.), 193 S. W. 894; McCloskey v. McCloskey, 93 Mo. App. 393, 67 S. W. 669; Kane v. Kane, 53 Mont. 519, 165 P. 457; Page v. Page, 161 N. C. 170, 76 S. E. 619; Random v. Random (N. D.), 170 N. W. 313; McGown v. McGown, 53 N. Y. S. 1108, 29 App. Div. 628, judgment affirmed 164 N. Y. 558, 58 N. E. 1089; *Ex parte* Ellerd (Tex. Civ. App.), 158 S. W. 1145.

The privilege given to a wife by a divorce decree to visit a child, the custody of which is given to the husband, is not an absolute right, but must yield to the good of the child. Bedolfe v. Bedolfe, 71 Wash. 60, 127 P. 594.

Sickness. Under decree in divorce relating to custody of child, the sickness of the child held not to modify the decree as to the husband's right to visit the child at the home of the wife's father. Rader v. Davis, 154 Ia. 306, 134 N. W. 849.

38. Phipps v. Phipps, 168 Mo. App. 697, 154 S. W. 825.

The right to visit should be cut off only on the clearest proof. Schlarb v Schlarb, 150 N. W. 593 (once in six months is a deprivation of the right to visit).

39. Smith v. Smith, 18 Wash. 158, 51 P. 355.

Where the child is given into the custody of a third person he has no right to forbid the parents from seeing the child except at certain stated periods.[40]

Where the husband and wife are to divide custody at stated periods the court should not order the dependent wife to send the child to the husband, but should order the husband to send for the child.[41]

§ 1896. Effect of Foreign Decree.

A divorce decree awarding custody of a child is not entitled to full faith and credit under the Federal Constitution in another State where the child becomes domiciled later. A child is not property, and the father can have no vested right in the child or its services under a decree divorcing the parents. The child is a ward of the State where he resides, and as such peculiarly under its guardianship, and that State is not bound to remand it to the jurisdiction of another State.[42] It has been held, however, that a decree of a sister State as to the custody of the children is *res judicata,* and is entitled to full faith and credit under the Federal Constitution, but it does not conclude the question for all time, since new facts may create new issues. The relation of parent and child is a status and may be changed with changing circumstances, and the welfare of the child is the paramount consideration and may be best subserved at one time by awarding its custody to one parent and at another time just the opposite course should be taken. These judgments are necessarily provisional and temporary in character, and are ordinarily not *res judicata,* either in the same court or that of a foreign jurisdiction, except as to facts before the court at the time of the judgment.[43]

40. Waters v. Gray (Mo. App.), 193 S. W. 33.

41. Johnston v. Johnston, 180 Ky. 439, 202 S. W. 869.

42. *In re* Bort, 25 Kan. 308, 37 Am. R. 255, Avery v. Avery, 33 Kan. 1, 5 P. 419; Allen v. Allen, 105 N. Y. 628. 11 N. E. 143; *Re* Alderman, 157 N. C. 507, 73 S. E. 126, 39 L. R. A. (N. S.) 988; Wilson v. Elliott, 96 Tex. 474, 73 S. W. 946, 75 S. W. 368.

43. Mylius v. Cargill (N. M.), 142 P. 918, L. R. A. 1915B, 154.

That portion of a divorce decree awarding the custody of the child and giving the father certain partial rights to visit the child and to have the child visit him is of no territorial effect beyond the limits of the State where it is rendered. Where the mother and child remove to another State the terms of the divorce decree do not constitute a judgment which, under the Federal Constitution, is entitled to full faith and credit in the State where they are living. The child is now a citizen of the State where he is living, and as such is a ward of this State, and no longer under the control of the State where the divorce was granted. Infants are wards of the State, and their best interests must in all cases govern. Children are not in any sense property of the parents.[44]

44. *Re* Alderman, 157 N. C. 507, 73 S. E. 126, 39 L. R. A. (N. S.) 988.

CHAPTER XLI.

CUSTODY OF CHILDREN; MODIFICATION OF ORDER.

SECTION 1897. Grounds of Modification; In General.
1898. Power to Change Custody.
1899. Proceedings to Modify Custody.
1900. Child Outside of Jurisdiction.
1901. Grounds of Modification; Welfare of Child.
1902. Grounds of Modification; Change in Character of Parties.
1903. Grounds of Modification; Remarriage of Parties.
1904. Death of Parent Given Custody.

§ 1897. Grounds of Modification; In General.

The modification must be based on some change in the circumstances,[45] based in some cases on the wishes of the chil-

45. Baker v. Durham, 95 Ark. 355, 129 S. W. 789; McKay v. McKay, 125 Cal. 65, 57 P. 677; Black v. Black, 149 Cal. 224, 86 P. 505; Ewing v. Ewing, 24 Ind. 468, 25 Ind. 155; Stone v. Stone, 158 Ind. 628, 64 N. E. 86; Breedlove v. Breedlove, 27 Ind. App. 560, 61 N. E. 797; Culwell v. Franks, 3 Ind. T. 548, 64 S. W. 532; Scott v. Scott, 174 Ia. 740, 156 N. W. 834; Kinney v. Kinney, 150 Ia. 225, 129 N. W. 826; Miles v. Miles, 65 Kan. 676, 70 P. 631; Duvall v. Duvall, 147 Ky. 426, 144 S. W. 78; McFerran v. McFerran, 21 Ky. Law Rep. 252, 51 S. W. 307; Sweeney v. Sweeney (Mich.), 162 N. W. 1015; Phipps v. Phipps, 168 Mo. App. 697, 154 S. W. 825; Nations v. Nations (Mo. App.), 213 S. W. 511; Cole v. Cole, 89 Mo. App. 228; De Lamoutte v. De Lamoutte, 113 N. Y. S. 321, 129 App. Div. 283; Earle v. Earle, 150 N. Y. S. 173, 164 App. Div. 713; *In re* Haworth, 69 N. Y. S. 843, 59 App. Div. 393; Karren v. Karren, 25 Utah, 87, 69 P. 465, 94 Am. St. R. 815, 60 L. R. A. 294 (in original divorce action); Koontz v. Koontz, 25 Wash. 336, 65 P. 546 (changed condition of child's health); Cain v. Cain, 90 Wash. 402, 156 P. 403; Kane v. Miller, 40 Wash. 125, 82 P. 177; *contra,* Stevens v. Stevens, 31 Colo. 188, 72 P. 1061. See Crockett v. Crockett, 132 Ia. 388, 106 N. W. 944 (removal of father to another city is not a change of condition; Woodhouse v. Woodhouse, 85 N. Y. S. 442, 89 App. Div. 88 (decree should not be modified to permit the wife, a person of immoral life, to visit the children).

The decree as to custody is final a to the conditions then existing and can be changed only on altered conditions since the decree or on material facts then existing. Cariens v. Cariens, 50 W. Va. 113, 40 S. E. 335, 55 L. R. A. 930.

The burden is on one claiming that

dren,[46] but not on the wishes of the parents.[47] Where it appears that a divorce decree was obtained by collusion it is not an abuse of discretion to modify an order for custody of children.[48] Quarrels over visits by the parent to the children may be avoided by a modification of the order.[49]

The decree in a divorce suit awarding the child to one of the parents is *prima facie* evidence of the legal right to its custody, but is not conclusive in *habeas corpus* proceedings where the circumstances and conditions or unfitness of the parent arising since the date of the decree is involved.[50]

§ 1898. Power to Change Custody.

An order as to the custody of children is not in the nature of a final order, but may be changed by the court,[51] although entered on

fact to show that conditions have so changed since a judgment of divorce awarding the custody to one parent as to render such parent an improper custodian, requiring that custody be given to another. Grego v. Schneider (Tex. Civ. App.), 154 S. W. 361.

46. Burritt v. Burritt, 102 N. Y. S. 475, 53 Misc. 24. See Hullinger v. Hullinger, 133 Ia. 269, 110 N. W. 470 (consent of children to visit to father not struck out).

47. Georig v. Georig, 51 Wash. 333, 98 P. 742.

48. Bancroft v. Bancroft (Cal.), 173 P. 582.

49. Bedolfe v. Bedolfe, 71 Wash. 60, 127 P. 594.

Visits. Where the court awards the custody to the wife, with the privilege of the husband to visit the child at reasonable intervals, the husband abusing the privilege may be deprived of it, and the wife, discouraging the husband's proper visits by making them difficult and disagreeable, may have the child taken from her. Dimmitt v. Dimmitt, 167 Mo. App. 94, 150 S. W. 1107.

50. Milner v. Gatlin, 143 Ga. 816, 85 S. E. 1045, L. R. A. 1916B, 977.

51. Hayes v. Hayes, 68 So. 351; Meffert v. Meffert, 177 S. W. 1; Scott v. Wheeler, 151 N. W. 1100; Daniels v. Daniels, 145 Ia. 422, 124 N. W. 169 (court may examine child privately); *Ex parte* Petitt, 84 Kan. 637, 114 P. 1071; Davis v. Davis, 140 Ky. 526, 131 S. W. 266; Perkins v. Perkins, 225 Mass. 392, 114 N. E. 713; Carpenter v. Carpenter, 171 Mich. 572, 137 N. W. 250; Griffin v. Griffin, 154 Mich. 536, 118 N. W. 1, 15 Det. Leg. N. 810; *In re* Krauthoff, 191 Mo. App. 149, 177 S. W. 1112; Sabourin v. Sabourin (Mo. App.), 213 S. W. 490; Brenneman v. Hildebrandt, 137 Mo. App. 82, 119 S. W. 452; Ullman v. Ullman, 135 N. Y. S. 1080, 151 App. Div. 419 (only after entry of judgment); Martin v. Martin, 123 N. Y. S. 509, 138 App. Div. 758;

agreement of parties which cannot deprive the court of jurisdiction.[52]

§ 1899. Proceedings to Modify Custody.

Proceedings for modification are in the nature of new proceedings and require proper notice to the opposite party,[53] and new evidence not available in the divorce suit.[54] So where the wife is successful in her divorce suit evidence against her character given in that suit is not a ground for showing the wife's unfitness.[55]

Where a bill is filed to set aside an award of custody of a child made in a divorce case the child is not a proper party to the bill, and is at most only a nominal party, and it is no error to refuse to appoint a guardian *ad litem* for it, the mother, its custodian, being before the court,[56] but it may be required that the child be represented by the prosecuting attorney before the decree is modified.[57]

§ 1900. Child Outside of Jurisdiction.

The court may retain jurisdiction to modify its order although the child is beyond the jurisdiction of the court.[58]

Cleveland Protestant Orphan Asylum v. Soule, 5 Ohio App. 67; McKay v. McKay, 77 Ore. 14, 149 P. 1032; Milner v. Gatlin (Tex. Civ. App.), 211 S. W. 617; Hall v. Whipple (Tex. Civ. App.), 145 S. W. 308; Plummer v. Plummer (Tex. Civ. App.), 154 S. W. 597; Buseman v. Buseman (W. Va.), 93 S. E. 574; Lessig v. Lessig, 136 Wis. 403, 117 N. W. 792. See Stanfield v. Stanfield, 22 Okla. 574, 98 P. 334.

52. Russell v. Russell, 20 Cal. App. 457, 129 P. 467; Combs v. Combs, 99 Kan. 626, 62 P. 273; Pangle v. Pangle (Md.), 106 A. 337 (on new evidence); Yates v. Yates, 157 Wis. 219, 147 N. W. 60.

53. Blachly v. Blachly, 151 N. W. 447; Purdy v. Ernst, 93 Kan. 157, 143 P. 429.

54. Wallace v. Wallace, 171 Ky. 192, 188 S. W. 331; Davis' Adm'r v. Cincinnati, N. O. & T. P. Ry. Co., 172 Ky. 55, 188 S. W. 1061; Camp v. Camp, 158 Mich. 221, 16 Det. Leg. N. 558, 122 N. W. 521; State *ex rel.* Tatum v. Ramey, 134 Mo. App. 722, 115 S. W. 458; Pierce v. Pierce, 52 Wash. 679, 101 P. 358. See Simmons v. Simmons, 22 Cal. App. 448, 134 P. 791.

55. Cline v. Cline (Ia.), 166 N. W. 698.

56. Kenner v. Kenner, 139 Tenn. 211, 201 S. W. 779, L. R. A. 1918E, 587.

57. Sweeney v. Sweeney (Mich.), 162 N. W. 1015.

58. Burns v. Shapley (Ala. App.), 77 So. 447; Miller v. Higgins, 14 Cal. App. 156, 111 P. 403; State v. Dis-

§ 1901. Grounds of Modification; Welfare of Child.

A decree for alimony may be modified so far as it is for the benefit of minor children so long as there are such children, as the duty of the father to the children arises from the relationship of parent and child, and wherever there are minor children to be cared for as wards of the court the court may act.[59]

Custody should usually be changed only where the interests of the child require a modification,[60] where it appears advisable for the good of the child.[61] So a modification giving a mother a right to visit may be refused where her visits have a bad effect on the child.[62]

Custody may be taken from one who is teaching the child to hate a parent or is unfit for any other reason,[63] and the court has power to modify its order as to the custody of the child where it appears

trict Court of Tenth Judicial Dist. in and for Fergus County, 128 P. 590; *contra*, Milner v. Gatlin, 139 Ga. 109, 76 S. E. 860.

Removal from State. Where a wife, obtaining a divorce and the custody of the child, is about to remove it from the jurisdiction of the court, the husband is entitled to a hearing to determine whether the best interests of the child require its retention within the jurisdiction of the court. Wald v. Wald, 168 Mo. App. 377, 151 S. W. 786.

59. Ruge v. Ruge (Wash.), 165 P. 1063, L. R. A. 1917F, 721.

60. Beyerle v. Beyerle, 155 Cal. 266, 100 P. 702; Morrill v. Morrill, 83 Conn. 479, 77 A. 1; Julian v. Julian, 111 N. E. 196; Shehan v. Shehan, 152 Ky. 191, 153 S. W. 243; State *ex rel.* Bush v. Trahan, 125 La. 312, 51 So. 216; Dailey v. Dailey, 166 Mich. 170, 131 N. W. 526 (abuse of child); Stone v. Stone, 117 Det. Leg. N. 410, 126 N. W. 710; Tatum v. Davis, 144 Mo. App. 125, 128 S. W. 766; Kane v. Kane, 53 Mont. 519, 165 P. 457; Davis v. Davis, 150 N. Y. S. 636; Bedingfield v. Bedingfield, 88 Ore. 711, 173 P. 255; Matthews v. Matthews, 60 Ore. 451, 119 P. 766; Dyer v. Dyer, 65 Wash. 535, 118 P. 634; Beers v. Beers, 74 Wash. 458, 133 P. 605. See Gillett v. Bryant, 203 Ill. App. 322.

61. Crater v. Crater, 135 Cal. 633, 67 P. 1049; Arne v. Holland, 85 Minn. 401, 89 N. W. 3; West v. West, 94 Mo. App. 683, 68 S. W. 753; Sabourin v. Sabourin (Mo. App.), 213 S. W. 490.

62. Bauer v. Bauer, 160 N. Y. S. 385.

63. Albertus v. Albertus (Ia.), 160 N. W. 830. See Freeland v. Freeland, 92 Wash. 482, 159 P. 698 (indiscretions of mother may not be enough to cause child to be taken from her).

that the order has not been complied with, but that the husband's parents, with whom the child was placed, are trying to poison the child's mind against the mother, and the court may order that the child be placed a portion of the time with the wife's parents.[64]

The fact that a child becomes ill does not affect the terms of a divorce decree giving its custody to the mother and denying the father the right to see the child.[65]

§ 1902. Grounds of Modification; Change in Character of Parties.

Modification in custody may take place where a change in the character of the parents has taken place,[66] as to give the offending parent a right to visit on evidence of his reformation.[67] So a divorce decree depriving the father of the custody of his child may be modified on evidence that the father had been for nine months after the decree was entered of a kindly disposition and leading an exemplary life, and this evidence may overcome the presumption against him afforded by the entry of the decree where the divorce was granted for cruelty, and it did not appear what was the nature of the unfitness on which the court acted, and where the mother

64. Copeland v. Copeland (Okla.), 159 P. 1122, L. R. A. 1917B, 287.

65. Rader v. Davis (Ia.), 134 N. W. 849, 38 L. R. A. (N. S.) 131.

66. Lindquist v. Lindquist, 148 Ia. 259, 126 N. W. 1109 (that wife reformed); Shallcross v. Shallcross, 135 Ky. 418, 122 S. W. 223; Stone v. Duffy, 219 Mass. 178, 106 N. E. 595 (parent becoming unfit); Bakley v. Bakley (N. J. Ch. 1907), 65 A. 440 (reformation of wife); Powers v. Powers, 150 N. Y. S. 213, 164 App. Div. 533, rehearing and leave to appeal to Court of Appeals denied (Sup.) 150 N. Y. S. 1107; order affirmed, 214 N. Y. 660, 108 N. E. 1106; Van Syckle v. Van Syckle, 152 N. Y. S. 1047, 168 App. Div. 924; Houghton v. Houghton, 37 S. D. 184, 157 N. W. 316; *Ex parte* Boyd (Tex. Civ. App.), 157 S. W. 254; Morin v. Morin, 66 Wash. 312, 119 P. 745 (insanity of mother). See Reitmann v. Reitmann, 168 Ky. 830, 183 S. W. 215 (that mother the housekeeper of widower not ground for change).

67. Bates v. Bates, 166 Ill. 448, 46 N. E. 1078; Copeland v. Copeland (Okla.), 159 P. 1122. See Newman v. Newman, 93 N. Y. S. 847, 105 App. Div. 63.

has since become insane, and it appears that the father is very much attached to the child.[68]

§ 1903. Grounds of Modification; Remarriage of Parties.

Custody should not be taken away from a parent to whom it was awarded merely on evidence of his remarriage,[69] and even the remarriage of a woman after divorce, going into another State to avoid a restraint on remarriage under the statute, is no such a breach of good morals or of public policy as to brand her with unfitness for the custody of her child awarded her under the divorce decree.[70] But where divorce is granted to the husband for adultery of the wife, and she then marries her paramour, an order for custody of the child will not be modified to give the wife custody for half the time.[71]

Where the parents of a delicate child had been twice divorced and remarried, the court may refuse to take the child away from the custody of an aunt where it is happy and well cared for.[72]

§ 1904. Death of Parent Given Custody.

Where a minor child is given to the mother, the father is entitled to it on her death, as he is bound to maintain it,[73] although she attempts by will to give the child to her parents.[74]

68. Morin v. Morin, 66 Wash. 312, 119 P. 745, 37 L. R. A. (N. S.) 585.

69. Crossett v. Whittmore, 206 Ill. App. 320; Dudley v. Dudley, 151 Ia. 142, 130 N. W. 785; Herrett v. Herrett, 80 Wash. 474, 141 P. 1158. See Colson v. Colson, 153 Ky. 68, 154 S. W. 380.

70. Dudley v. Dudley (Ia.), 130 N. W. 785, 32 L. R. A. (N. S.) 1170; Jensen v. Jensen (Wis.), 170 N. W. 735.

71. Pangle v. Pangle (Md.), 106 A. 337.

72. Waters v. Gray (Mo. App.), 193 S. W. 33.

73. Yates v. Yates, 165 Wis. 250, 161 N. W. 743.

74. Rallihan v. Motschmann, 179 Ky. 180, 200 S. W. 358.

CHAPTER XLII.

SUPPORT OF CHILDREN.

SECTION 1905. Jurisdiction to Make Order for Support.
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§ 1905. Jurisdiction to Make Order for Support.

The court is usually given the power to order payment by either parent for the support of the child,[75] including medical treatment.[76]

The decree should make provision guarding against the misappropriation of the money,[77] but will not usually be a lien on the estate of the husband.[78]

75. Harlan v. Harlan, 154 Cal. 341, 98 P. 32 ("care" of child defined); Evans v. Evans, 154 Cal. 644, 98 P. 1044; Dickinson v. Dickinson, 58 Fla. 214, 50 So. 572; Gilbert v. Gilbert, 149 Ky. 638, 149 S. W. 964; Fisher v. Fisher (Mo. App.), 207 S. W. 261; Griffith v. Griffith (Mo. App.), 190 S. W. 1021; Ryynard v. Gardner, 7 Ohio App. 262; Jacobs v. Jacobs, 79 Ore. 143, 154 P. 749; Graham v. Graham (Tenn.), 204 S. W. 987; Hector v. Hector, 51 Wash. 434, 99 P. 13; Fitzpatrick v. Fitzpatrick (Wash.), 177 P. 790.

76. *Specialist.* Where divorce decree required the husband to pay for services of a physician to his children, he could not be made liable for the services of a specialist to a child, rendered without his consent. Ryder v. Perkins, 219 Mass. 525, 107 N. E. 387.

77. Earle v. Earle, 143 N. Y. S. 841, 158 App. Div. 552.

78. Matthews v. Wilson, 31 Ind. App. 90, 67 N. E. 280; Longbotham v. Longbotham, 119 Minn. 139, 137 N. W. 387; Mansfield v. Hill, 108 P. 1007, modifying judgment on rehearing 56 Ore. 400, 107 P. 471; Gully v. Gully (Tex. Civ. App.), 184 S. W. 555 (community property). See Stone v. Bayley, 75 Wash. 184, 134 P. 820.

Allowance by the trial court for the support of children will be sustained unless unreasonable.[79]

§ 1906. Support Considered in Awarding Alimony.

The fact that the wife is given the custody of children which she has to support may be considered in fixing the amount of alimony.[80]

§ 1907. Effect of Settlement Between Parties.

The settlement by the parties of their property interests prior to the divorce does not deprive the court of its right to enforce payments for the children,[81] and where the sum agreed on by the parties on separation for the husband to pay the wife proves inadequate for the support of the children the court has jurisdiction to award more.[82] An agreement concerning the care of minor children left with the mother will not include payments made for their support after they come of age.[83]

§ 1908. Fault of Parties.

A husband at fault may be ordered to pay for the support of his

79. Benson v. Benson, 29 Cal. App. 37, 154 P. 285; Johnson v. Johnson, 131 Ga. 606, 62 S. E. 1044 (settlement for wife is not to be considered in estimating allowance to child); Hartl v. Hartl, 155 Ia. 329, 135 N. W. 1007; Harris v. Harris, 5 Kan. 46; Day v. Day, 168 Ky. 68, 181 S. W. 937; Anderson v. Anderson, 152 Ky. 773, 154 S. W. 1; Hooe v. Hooe, 122 Ky. 590, 29 Ky. Law Rep. 113, 92 S. W. 317, 5 L. R. A. (N. S.) 729; Irwin v. Irwin, 105 Ky. Law Rep. 223, 62 S. W. 719; Barlow v. Barlow, 28 Ky. Law Rep. 1014, 90 S. W. 1055; Allen v. Allen, 155 N. W. 488; Gittings v. Gittings (Mich.), 163 N. W. 900; Austin v. Austin, 172 Mich. 620, 138 N. W. 215; Valentine v. Valentine, 84 N. Y. S. 37, 87 App. Div. 151; Taylor v. Taylor, 47 Ore. 47, 81 P. 367; McDonall v. McDonall, 95 Wash. 553, 164 P. 204 (where order was for same sum he had been contributing); Schirmer v. Schirmer, 84 Wash. 1, 145 P. 981; Hiecke v. Hiecke, 163 Wis. 171, 157 N. W. 747.

80. Williamson v. Williamson (Ky.), 209 S. W. 503; Hildebrand v. Hildebrand, 41 Okla. 306, 137 P. 711.

81. Miller v. Miller (Wash.), 175 P. 295.

82. Cain v. Cain, 177 N. Y. S. 178.

83. Young v. Young (Ia.), 162 N. W. 617.

children after divorce,[84] or pending the action for divorce,[85] or the husband may be ordered to support his minor children even where the wife is at fault.[86]

§ 1909. Against Non-Resident.

The court has no jurisdiction if the defendant is a non-resident to award an allowance for custody of children against him,[87] but after the order is once properly made the father cannot evade the performance of the decree by absenting himself from the State or

84. Lampson v. Lampson, 171 Cal. 332, 153 P. 238; People v. Schlott, 162 Cal. 347, 122 P. 846; Nave v. Nave (Cal. App.), 169 P. 253; State v. Rogers (Del. Gen. Sess. 1895), 2 Marv. 439, 43 A. 250; Johnson v. Johnson, 131 Ga. 606, 62 S. E. 1044; Konitzer v. Konitzer, 112 Ill. App. 326; Slattery v. Slattery, 139 Ia. 419, 116 N. W. 608; Ostheimer v. Ostheimer, 125 Ia. 523, 101 N. W. 275; Shepherd v. Shepherd, 174 Ky. 615, 192 S. W. 658; Griffin v. Griffin, 173 Ky. 636, 191 S. W. 458; Davis v. Davis, 165 Ky. 115, 176 S. W. 955; Hall. v. Hall, 25 Ky. Law Rep. 1304, 77 S. W. 668; Shannon v. Shannon, 97 Mo. App. 119, 71 S. W. 104; Lukowski v. Lukowski, 108 Mo. App. 204, 83 S. W. 274; Cole v. Cole, 115 Mo. App. 466, 91 S. W. 457; Abele v. Abele, 62 N. J. Eq. 644, 50 A. 686; Earle v. Earle, 143 N. Y. S. 841, 158 App. Div. 552; Moore v. Moore (Okla.), 158 P. 578 (order adjudging interest in property to wife); Gibson v. Gibson, 18 Wash. 489, 51 P. 1041, 40 L. R. A. 587. See Martin v. Martin (Tex. Civ. App.), 148 S. W. 344; Bond v. Bond (Tex. Civ. App. 1905), 90 S. W. 1128.

Clothing. Where the custody of the children was awarded the plaintiff wife, she should be allowed to select their clothing, and an allowance for the clothing should be made in the award of alimony. Smith v. Smith (Mo. App.), 180 S. W. 568.

Removal from State. The measure of infants' claims on the court and on funds set aside for them in a divorce suit is their necessities, independent of any misconduct by either party to the suit; and hence it is error to withhold benefits from children to punish their mother for taking them from the court's jurisdiction. Fullen v. Fullen, 21 N. M. 212, 153 P. 294.

85. Penningroth v. Penningroth, 71 Mo. App. 438; Wood v. Wood, 70 N. Y. S. 72, 61 App. Div. 96.

86. Gilbert v. Gilbert, 149 Ky. 638, 149 S. W. 964; Bailie v. Bailie, 53 N. Y. S. 866, 5 N. Y. Ann. Cas. 193 (where husband contests validity of wife's foreign divorce). See Deefee v. Deefee (Tex. Civ. App. 1899), 51 S. W. 274 (not where divorce denied to husband).

87. Kell v. Kell (Ia.), 161 N. W. 634.

changing his domicile, but it may be enforced against him like any other judgment.[88]

The duty of a father to support his children after divorce is imposed by the State for the benefit of the child, and to prevent the child from being a charge on the State, and therefore this duty may be enforced wherever the child is at the time domiciled. So although a divorce is granted by a foreign court, proceedings for the support of the child may be brought where the child is domiciled.[89]

§ 1910. Power After Decree in Divorce.

The court may usually issue an order for support even though the subject is not covered at all in the decree of divorce.[90] Although the divorce decree makes no order as to the support of a child, still, as this duty of the husband is a continuing one, the court may later, on the application of the wife, make an appropriate order under a statute providing that the court may make such order as may be right, and may make subsequent changes in it.[91]

§ 1911. Order for Custody Does Not Cover Support.

A statute merely giving the court jurisdiction to award custody gives it no right to order future support,[92] and a decree simply

88. White v. White, 65 N. J. Eq. 741, 55 A. 739.

89. Winner v. Shucart (Mo.), 215 S. W. 905.

90. Lewis v. Lewis (Cal.), 163 P. 42; Harlan v. Harlan, 154 Cal. 341, 98 P. 32; Ostheimer v. Ostheimer, 125 Ia. 523, 101 N. W. 275; Hill v. Hill, 196 Mass. 509, 82 N. E. 690; Robinson v. Robinson, 168 Mo. App. 639, 154 S. W. 162, 186 S. W. 1032; Kinsolving v. Kinsolving (Mo. App.), 194 S. W. 530; Robinson v. Robinson, 168 Mo. App. 639, 154 S. W. 162; Meyers v. Meyers, 91 Mo. App. 151; White v. White, 138 N. Y. S. 1082, 154 App. Div. 250; Renner v. Renner, 127 Wis. 371, 106 N. W. 846; *contra*, Salomon v. Salomon, 92 N. Y. S. 184, 101 App. Div. 588, 34 Civ. Proc. R. 113. See Harlan v. Harlan, 154 Cal. 341, 98 P. 32.

91. Spain v. Spain (Ia.), 158 N. W. 529, L. R. A. 1917D, 319.

92. Gully v. Gully (Tex. Civ. App.), 173 S. W. 1178.

awarding custody does not require support,[93] and where the children are on divorce awarded to the mother, the question of the father's liability for their support, in the absence of express direction in the decree, is a mooted question, and it has been held that under such circumstances she could not recover from him for their support. On the entry of the divorce decree the woman became a single woman, with the rights of a surviving parent, as fully as though the father had been taken by death. The father was divested of all paternal rights, and his paternal duties, if any, which survived were defined by the decree of the court in divorce.[94]

§ 1912. Father's Liability for Necessaries After Divorce.

The liability of a father for necessaries furnished to his minor child continues even after divorce,[95] and whether they remain in his custody or not.[96] Where the decree awards custody to the father without provision for maintenance, and the mother advances money for support, she can sue the father therefor, and is not limited to a motion to modify the decree,[97] and the mother may generally in an independent action recover sums paid for the child's support.[98] But an order cannot be made for the support of children where they have been supported by the voluntary act of the mother and her second husband under a statute providing for "necessary" support.[99]

§ 1913. Division of Property.

The court has no authority to award the property of a parent to the children for their support,[1] and the court should not attempt

93. People v. Hartman, 23 Cal. App. 72, 137 P. 611.

94. Finch v. Finch, 22 Conn. 411.

95. Ligon v. Ligon (Tex. Civ. App. 1905), 87 S. W. 838.

96. Jones v. Jones, 173 N. C. 279, 91 S. E. 960; Wheeler v. Lowell (Vt.), 100 A. 39.

97. Bennett v. Robinson, 180 Mo. App. 56, 165 S. W. 856.

98. Brown v. Brown, 132 Ga. 712, 64 S. E. 1092.

99. McKay v. McKay, 125 Cal. 65, 57 P. 677. See Rivers v. Rivers (Tex. Civ. App. 1910), 133 S. W. 524.

1. Emery v. Emery (Kan.), 180 P.

to control the division of the property of the defeated party among the children.[2]

§ 1914. Criminal Liability.

Where a divorce decree gives the custody of the children to the mother and orders the father to provide certain sums for their payment at regular intervals, which he does for a time and then stops payments, he cannot be convicted under a statute making it a felony to abandon and contemporaneously neglect or refuse to provide, as the desertion occurred in this case long before the abandonment.[3] But under a statute making it a criminal offence to fail to provide for a minor child, a father who fails to comply with a decree in divorce ordering him to provide for the support of the minor children is liable to prosecution.[4]

§ 1915. Modification of Order for Support.

An award for support of children can be changed by the court only as authorized by statute or by right reserved in the decree itself.[5] Statutes commonly allow the court to modify its allowances for support of children from time to time according to the circumstances,[6] but only on showing change of circum-

451; Melton v. Every (Kan.), 182 P. 543.

2. Davison v. Davison (Ia.), 165 N. W. 44.

3. People v. Dunston (Mich.), 138 N. W. 1047, 42 L. R. A. (N. S.) 1065.

4. People v. Schlott, 162 Cal. 347, 122 P. 846.

As to criminal liability for neglect of children, see further *ante*, § 799 *et seq.*

5. Sweeney v. Sweeney (Nev.), 179 P. 638.

6. Bancroft v. Bancroft (Cal.), 173 P. 582 (allowance made for expense of trip of son); Lewis v. Lewis (Cal.), 163 P. 42; Simmons v. Simmons, 22 Cal. App. 448, 134 P. 791 (payments must be used for child and not for support of new family on remarriage); Calegaris v. Calegaris, 4 Cal. App. 264, 87 P. 561; Hilliard v. Hilliard, 197 Ill. 549, 64 N. E. 326; Pearson v. Pearson, 179 Ill. App. 127; Julian v. Julian, 111 N. E. 196; Tobin v. Tobin, 29 Ind. App. 382, 64 N. E. 24; Spain v. Spain, 177 Ia. 249, 158 N. W. 529; Kinney v. Kinney, 150 Ia. 225, 129 N. W. 826; Harris v. Harris, 5 Kan. 46; Kendall v. Kendall, 5 Kan. App. 688, 48 P. 940 (payments commencing from date of modification); Mansfield v. Mansfield, 21 Ky. Law Rep. 1077, 54 S. W. 16; Meyers v.

stances,[7] notwithstanding an agreement of parties,[8] the welfare of the child being the paramount consideration.[9] The right to payments ordered becomes vested as they accrue, and the court has no right to make any order changing them retrospectively.[10] The decree may be modified by ordering the money paid to a court officer as provided in a statute passed after the date of the decree.[11]

Meyers, 17 Det. Leg. N. 367, 126 N. W. 841; Young v. Young (Mich.), 172 N. W. 414; Myers v. Myers, 143 Mich. 32, 106 N. W. 402, 12 Det. Leg. N. 885 (removal of child from State); McAllen v. McAllen, 97 Minn. 76, 106 N. W. 100; Meyers v. Meyers, 91 Mo. App. 151; Kraus v. Kraus, 98 Mo. App. 427, 72 S. W. 130; Connett v. Connett, 81 Neb. 777, 116 N. W. 658; Mack v. Mack (Ore.), 179 P. 557; McFarlane v. McFarlane, 43 Ore. 477, 73 P. 203 (after default divorce decree); Houghton v. Houghton, 37 S. D. 184, 157 N. W. 316; Marks v. Marks, 22 S. D. 453, 118 N. W. 694 (though complaint did not claim allowance); Harris v. Harris, 71 Wash. 307, 128 P. 673; Ruge v. Ruge (Wash.), 165 P. 1063. See Greenwood v. Greenwood, 85 Kan. 303, 116 P. 828 (court cannot cancel contract between the parties so far as it does not interfere with the rights of the children).

On death of the father the court may modify the decree by treating the payments for children as an annuity, fixing the present value and ordering this sum paid out of the father's estate. Creyts v. Creyts, 143 Mich. 375, 106 N. W. 1111, 12 Det. Leg. N. 1039, 114 Am. St. R. 656.

7. O'Kane v. Lyle (Ark.), 185 S. W. 281; Harris v. Harris, 65 Fla. 50, 61 So. 122; Keesling v. Keesling, 42 Ind. App. 361, 85 N. E. 837; Peitzman v. Peitzman, 147 Ia. 704, 125 N. W. 218; Youde v. Youde, 136 Ia. 719, 114 N. W. 190; Pennington v. Pennington (Ia.), 169 N. W. 327 (support only till son becomes 18 on account of financial loss); Cline v. Cline (Ia.), 166 N. W. 698 (moral unfitness of mother); Schlarb v. Schlarb, 150 N. W. 593; Brice v. Brice, 50 Mont. 388, 147 P. 164; Earle v. Earle, 143 N. Y. S. 841, 158 App. Div. 552; Graviess v. Graviess, 28 Ohio Cir. Ct. R. 26; Gadsby v. Gadsby, 65 Ore. 309, 131 P. 1022; Phillips v. Phillips (Tex. Civ. App.), 203 S. W. 77; Plummer v. Plummer (Tex. Civ. App.), 154 S. W. 597; White v. McDowell, 74 Wash. 44, 132 P. 734. See Hauck v. Hauck, 198 Mo. App. 381, 200 S. W. 679 (cannot require security ten years after order).

8. Camp v. Camp, 158 Mich. 221, 16 Det. Leg. N. 558, 122 N. W. 521; Connett v. Connett, 81 Neb. 777, 116 N. W. 658; Gibbons v. Gibbons, 75 Ore. 500, 147 P. 530.

9. Kane v. Kane, 53 Mont. 519, 165 P. 457.

10. Kell v. Kell (Ia.), 161 N. W. 634.

11. Gittings v. Gittings (Mich.), 163 N. W. 900.

§ 1916. Termination of Liability for Support.

The father remains liable for the support of his children although they are given to the mother on divorce,[12] but only during the minority of the child.[13]

A contract by a father in settlement of a divorce obtained against him to make certain monthly payments for the support of his child during its minority is binding upon his estate. At common law a father is under no obligation to provide for the support of his children after his death. The court remarks, however, that such can only be the law when the family relations remain intact and when there is no great danger that such an arbitrary power will be exercised. When through the fault of the father his family is broken up, and his children become in one sense the wards of the court, this power is taken from him, and he may be compelled, if of sufficient ability, to give security for the support of his children that shall be binding upon his estate, or provision may be enforced by the court out of his estate.[14]

12. Kinsolving v. Kinsolving (Mo. App.), 194 S. W. 530; Auer v. Auer (Mo. App.), 193 S. W. 926.

13. Tremper v. Tremper (Cal. App.), 177 P. 868; Emery v. Emery (Kan.), 180 P. 451 (cannot order property awarded to children for their permanent benefit); Mack v. Mack (Ore.), 179 P. 557.

14. Stone v. Bayley (Wash.), 134 P. 820, 48 L. R. A. (N. S.) 429. See to the same effect Winner v. Shucart (Mo.), 215 S. W. 905.

CHAPTER XLIII.

PROHIBITION ON REMARRIAGE

SECTION 1917. Power to Prohibit Remarriage.
1918. Equity Jurisdiction Over.
1919. Constitutionality.
1920. Computation of Time of Prohibition.
1921. Remarriage Within Time for Appeal Prohibited.
1922. Prohibition Against Marriage With Accomplice.
1923. Effect of Good Faith of Party Remarrying.
1924. Whether Prohibited Marriage Is Void or Voidable.
1925. Effect of Subsequent Cohabitation on Prohibited Second Marriage.
1926. Leave to Remarry.
1927. Right to Marry After Expiration of Prohibition.
1928. Effect of Prohibition on Right of Parties to Marry Each Other.
1929. Effect of Prohibition on Contract to Marry.
1930. Extraterritorial Effect in General of Prohibition.
1931. Validity of Foreign Prohibited Marriage in Domicile.
1932. Effect of Foreign Prohibited Marriage in Third State.
1933. Prohibited Foreign Marriage as Crime or Contempt.
1934. Effect of Vacation of Divorce on Remarriage.

§ 1917. Power to Prohibit Remarriage.

A decree that the guilty party shall not marry again until further order of the court,[15] or remarriage by the guilty party within a certain time after the decree, may be prohibited by statute.[16]

§ 1918. Equity Jurisdiction Over.

A court of equity has no jurisdiction in matters which do not involve property or civil rights, and no such rights are involved in

15. Musick v. Musick, 88 Va. 12, 13 S. E. 302; *contra,* Underwood v. Underwood (W. Va.), 98 S. E. 207.

16. Griswold v. Griswold, 23 Colo. App. 365, 129 P. 560; People v. Prouty, 262 Ill. 218, 104 N. E. 387; Barnett v. Frederick, 33 Okla. 49, 124 P. 57.

A decree of divorce, which restores the parties to the rights and privileges of unmarried persons, is in contravention of the statute which pro-

a divorce decree forbidding the parties from remarrying again within a certain period when this is expressly forbidden by a penal statute.[17]

§ 1919. Constitutionality.

A prohibition against the remarriage of one against whom a divorce is granted is constitutional.[18]

§ 1920. Computation of Time of Prohibition.

Where the prohibition is against remarriage within one year a remarriage is void which took place on the same date as the decree a year later, although later in the day, as the first day should be excluded and the last included.[19]

§ 1921. Remarriage Within Time for Appeal Prohibited.

A remarriage of the defendant against whom a decree of divorce has been entered at 9.30 of the evening of the last day of the prohibited period, where, in order to take an appeal, the notice must have been served and filed in the clerk's office several hundred miles away, and where it was then past the time for the clerk's office to be open, thus making an appeal practically impossible, may be sustained. The defendant knew at that time that no appeal would or could be taken and could, without violating either the letter or the spirit of the law, waive her appeal for two and a half hours and marry a third person.[20]

Where a decree of divorce is entered by default the defendant has no right of appeal, and therefore may, it seems, remarry with-

hibits remarriage within certain periods Kidd v. Kidd, 164 Ill. App. 542.

17. People v. Prouty, 262 Ill. 218, 104 N. E. 387, 51 L. R. A. (N. S.) 1140.

18. Olsen v. People, 219 Ill. 40, 76 N. E. 89; Hobbs v. Hobbs, 279 Ill. 163, 116 N. E. 629; Durland v. Durland, 67 Kan. 734, 74 P. 274, 63 L. R. A. 959.

19. Kahlo v. Kahlo, 204 Ill. App. 409.

20. Wallace v. McDaniel, 59 Ore. 378, 117 P. 314, L. R. A. 1916C, 744.

§ 1927. Right to Marry After Expiration of Prohibition.

Either party can remarry after the expiration of the time within which the guilty party is forbidden to remarry.[33]

§ 1928. Effect of Prohibition on Right of Parties to Marry Each Other.

A prohibition against the remarriage of the guilty party after divorce will not prevent the divorced parties from remarrying each other.[34]

§ 1929. Effect of Prohibition on Contract to Marry.

A divorced person may within the prohibited period contract to marry beyond the period in the absence of statute.[35]

§ 1930. Extraterritorial Effect in General of Prohibition.

There is still considerable conflict and confusion of decision and theory as to the extraterritorial effect of a prohibition on remarriage. It was formerly the general view that such prohibitions had no effect whatever to prohibit marriages made in another jurisdiction, but the courts are gradually taking a less liberal view, and now such marriages, although still upheld where made, are discountenanced in the State of the domicile, especially if the parties went to another State for the purpose of avoiding the prohibition. They may even not be recognized in a third State having similar laws. Such marriages may not, however, be considered as crime or contempt even in the State of the domicile.

Every State has the power to enact laws which will personally bind its citizens while sojourning in a foreign jurisdiction and to declare that marriages between its citizens in foreign States in

33. Baughman v. Baughman, 32 Kan. 538, 4 P. 1003.

34. Chase v. Chase, 191 Mass. 166, 77 N. E. 782. See *in re* Eichler, 146 N. Y. S. 846, 84 Misc. 667.

35. Powell v. Powell, 282 Ill. 357 118 N. E. 786; J. P. Leininger Lumber Co. v. Dewey, 86 Neb. 659, 126 N. W. 87; Thomas v. James (Okla.), 171 P. 855; Kitzman v. Kitzman, 167 Wis. 308 166 N. W. 789.

disregard of the statutes of the State of their domicile will not be recognized in the courts of the latter State though valid where celebrated. So a statute forbidding the remarriage of either party after divorce within one year applies to such a marriage celebrated out of the State between citizens of the State.

The court remarks that formerly statutes prohibiting the marriage of the party in fault have been construed as penal in their nature and having no extraterritorial effect. Marriages contracted outside the State have in this view been held valid in States having such statutes.[36] This statute is not, however, penal in character, for it treats the innocent and guilty alike, and declares the broad public policy that an incapacity to marry shall follow a divorce in any event. Where such a statute is enacted with a positive incapacity for marriage a marriage contracted in disregard of the prohibition of the statute, wherever contracted, will be void.[37]

There are many decisions, however, holding that a State statute prohibiting the remarriage of a divorced person has no extraterritorial effect, so such a marriage celebrated in another State is valid,[38] and that a prohibition on remarriage is only effective in

36. Comm. v. Lane, 113 Mass. 458, 18 Am. R. 509; Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. R. 505; State v. Shattuck, 69 Vt. 403, 60 Am. St. R. 936, 40 L. R. A. 428; Frame v. Thormann, 102 Wis. 654, 79 N. W. 39.

37. Wilson v. Cook, 256 Ill. 460, 100 N. E. 222, 43 L. R. A. (N. S.) 365; Lanham v. Lanham, 136 Wis. 360, 117 N. W. 787, 17 L. R. A. (N. S.) 804, 128 Am. St. R. 1085.

38. *In re* Wood's Estate, 137 Cal. 129, 69 P. 900; Appeal of Wood, *Id.*; People v. Woodley, 22 Cal. App. 674, 136 P. 312; Crouse v. Wheeler (Colo.), 158 P. 1100; Loth v. Loth's Estate, 54 Colo. 200, 129 P. 827; Dudley v. Dudley, 151 Ia. 142, 130 N. W. 785; Commonwealth v. Lane, 113 Mass. 458, 18 Am. St. R. 509; Commonwealth v. Hunt, 58 Mass. (4 Cush.) 49; Sutton v. Warren, 51 Mass. (10 Metc.) 452; *Ex parte* Crane, 136 N. W. 587; Goodwin v. Goodwin, 142 N. Y. S. 1102, 158 App. Div. 171, affirming judgment 141 N. Y. S. 175, 80 Misc. 303; Goodwin v. Goodwin, 141 N. Y. S. 175, 80 Misc. 303; Petit v. Petit, 91 N. Y. S. 979, 45 Misc. 155; Wingo v. Rudder (Tex. Civ. App. 1909), 120 S. W. 1073; State v. Richardson, 72 Vt. 49, 47 A. 103; Frame v. Thorman, 102 Wis. 653, 79 N. W. 39, affd. Thorman v. Frame (1900), 176 U. S. 350, 20 S. Ct. 446, 44 L. Ed. 500; Willey v. Willey, 22 Wash. 115, 60 P. 145, 79 Am. St. R. 923 (common-law marriage in another State is valid); State v. Fenn, 47 Wash. 561, 92 P. 417; *contra*, New-

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the jurisdiction where the decree is granted and does not invalidate a marriage in another jurisdiction.[39]

§ 1931. Validity of Foreign Prohibited Marriage in Domicile.

A marriage by one forbidden to remarry, celebrated in another State where the parties go to avoid the prohibition, will not be recognized in the State where the divorce was granted,[40] but if one of the parties is innocent the marriage may be valid even there,[41] and it may be valid in the State of the domicile from the date of the expiration of the disability.[42]

Where one goes to another State and marries to avoid the prohibition against remarriage in a divorce decree against him, and immediately returns, the marriage is void in the State of his domicile, and the issue of this marriage is illegitimate. The fact that he has a child living with him of this marriage does not make him a head of a family entitled to exemptions. Hence, the fact that he subsequently contracted a valid marriage after a fire and before trial does not make money received from the insurance company exempt from execution.[43]

§ 1932. Effect of Foreign Prohibited Marriage in Third State.

Where a divorced person went to another State and remarried in violation of the prohibition against remarriage in the divorce

man v. Kimbrough (Tenn. Ch. App. 1900), 59 S. W. 1061 (marriage with paramour). See Lee v. Lee, 150 Ia. 611, 130 N. W. 128.

39. Dimpfel v. Wilson, 107 Md. 329, 68 A. 561, 13 L. R. A. (N. S.) 1180.

40. Wilson v. Cook, 256 Ill. 460, 100 N. E. 222; People v. Prouty, 262 Ill. 218, 104 N. E. 387; Nelson v. Nelson, 200 Ill. App. 584; People v. Schmutz, 198 Ill. App. 108; Rand v. Bogle, 197 Ill. App. 476; Nehring v. Nehring, 164 Ill. App. 527; Tyler v. Tyler, 170 Mass. 150, 48 N. E. 1075; Knoll v. Knoll (Wash.), 176 P. 22; Peerless Pacific Co. v. Burckhard, 90 Wash. 221, 155 P. 1037; Pierce v. Pierce, 58 Wash. 522, 109 P. 45; Lanham v. Lanham, 136 Wis. 360, 117 N. W. 787, 17 L. R. A. (N. S.) 804; White v. White (Wis.), 168 N. W. 704. See Powell v. Powell (Ill.), 118 N. E. 786, 207 Ill. App. 292.

41. Gardner v. Gardner (Mass.), 122 N. E. 308.

42. Mock v. Chaney, 36 Colo. 60, 87 P. 538.

43. Peerless Pacific Co. v. Burckhard, 90 Wash. 221, 155 P. 1037, L. R. A. 1917C, 353.

decree, and the parties then move to another State, the marriage is void there in view of the full faith and credit provision of the Federal Constitution.[44]

This marriage will not be recognized in the courts of a third State where the parties become domiciled whose laws evince the same public policy as the State of the divorce as to remarriage. "Reasonable restrictions against speedy remarriage of divorced parties are becoming more common in the statutes of our States, and their intentional violation should find no sanction in States having similar restrictions. Only by each State enforcing public policies common to it and other States can our divorce laws be freed from the odium of being wilfully violated with impunity." "Comity between States is daily growing and should be encouraged." The fact that the parties cohabited in the third State for a period beyond the prohibited period is immaterial as a marriage void in its inception cannot become valid by the establishment of an actual contract of marriage after the removal of the impediment which rendered it illegal in the first instance.[45]

§ 1933. Prohibited Foreign Marriage as Crime or Contempt.

Statutes forbidding remarriage of divorced persons within a certain period have no extraterritorial effect, therefore where a woman who has been divorced leaves the State temporarily and goes into another State, where she marries again and returns to the State of her domicile, where she lives with the new husband, no crime has been committed. The remarriage was not in violation of the law of her own State, as it did not take place there. It was not in violation of the law of the other State as no decree was ever entered there forbidding remarriage, and the marriage was good there where consummated, and is therefore good when the parties returned to the State of their domicile.[46]

44. Hall v. Industrial Commission, 165 Wis. 364, 162 N. W. 312, L. R. A. 1917D, 829.

45. Hall v. Industrial Commission, 165 Wis. 364, 162 N. W. 312, L. R. A. 1917D, 829.

46. Dudley v. Dudley (Ia.), 130 N. W. 785, 32 L. R. A. (N. S.) 1170.

Where the statute forbids the remarriage of a divorced person within two years, and provides as a penalty that such remarriage shall be construed as bigamy, a divorced person who goes into another State and remarries contrary to the penalty of the statute cannot be found guilty of contempt. The court holds that the power of the court is dependent on the statute and the court has no power independent of the statute, and the consequences of a breach are confined to the penalty of the statute and therefore the court has no power to punish the defendant as for a criminal contempt.[47]

§ 1934. Effect of Vacation of Divorce on Remarriage.

A vacation of a divorce decree within the prohibited period makes a second marriage within that period absolutely void.[48]

47. *Ex parte* Crane (Mich.), 136 N. W. 587, 40 L. R. A. (N. S.) 765.

48. Griswold v. Griswold, 23 Colo. App. 365, 129 P. 560.

CHAPTER XLIV.

EFFECT OF DIVORCE.

SECTION 1935. Law of What Time Governs.
1936. Mutual Rights Pending Divorce Proceedings.
1937. Death After Decree Nisi and Before Final Decree.
1938. Effect of Decree of Separation.
1939. Status of Divorced Person.
1940. Husband's Right to Administer.
1941. Right to Marry in Absence of Prohibition.
1942. Title to Property; English Doctrine.
1943. Title to Property; American Doctrine.
1944. Tenancy by Entireties.
1945. Tenancy by Entireties; Conveyance by Husband; Limitations.
1946. Insurance for Benefit of Wife.
1947. Trusts.
1948. Rights of Action With Third Parties.
1949. Rights of Action *Inter Se*.
1950. Decree Does not Validate Prior Second Marriage
1951. Effect of Decree of Divorce for Duress in Obtaining Marriage.
1952. Remarriage of Parties With Each Other.

§ 1935. Law of What Time Governs.

The effect of a divorce is determined by the law in force when it was granted.[49]

§ 1936. Mutual Rights Pending Divorce Proceedings.

The mutual rights of a married pair, pending divorce proceedings, sometimes, though rarely, receive attention in the courts: as, for instance, where a wife receives injuries from a third person while living apart from her husband, and afterwards obtains a divorce.[50] But though she claims to own the conjugal dwelling-

49. Whitsell v. Mills, 6 Ind. 229.

50. See Peru v. French, 55 Ill. 317. In matters relating to marriage and divorce, the writer acknowledges his indebtedness to the justly valued treatise of Mr. Bishop. Yet he confesses his inability to follow those who argue that lax divorce laws will mend lax morals; not that either strict or lax divorce laws can fully subdue crime; but because history teaches that loose laws rather stimu-

house, and has left it because of her husband's adultery, she has no right, independently of legislation, to require him to vacate before divorce is granted, even though consistently refusing to cohabit there.[51] So, too, the wife cannot be compelled to vacate the matrimonial dwelling while her husband's bill for divorce is pending; but, upon the decree of absolute divorce, her rights to all or any part of the premises ceases, and by remaining she becomes an intruder.[52]

§ 1937. Death After Decree Nisi and Before Final Decree.

Where one of the parties dies after a decree *nisi* has been entered, and before the entry of a final decree, this puts an end to the suit and prevents the entry of a decree absolute.[53]

§ 1938. Effect of Decree of Separation.

Divorce from bed and board, or *nisi*, produces, however, no such sweeping results as does absolute divorce, the cardinal doctrine

late than check marital infidelity; while it is found otherwise with countries where stricter laws have prevailed. To say that crime causes the divorce, not divorce the crime, is illogical; the one acts upon the other in any community. As one's familiarity with death tends to make him rather reckless than serious, ferocious than compassionate; and as contact with criminal courts almost inevitably corrupts the young; so the influence of divorces, when of common occurrence, is to deteriorate the national character. When parties united in the solemn responsibilities of marriage can coolly discuss and arrange the preliminaries of final dissolution, and haste to obtain judicial relief, for the purpose of forming a new union, as is sometimes done in our land, they are hardly fitted to discharge nature's highest obligations to one another; certainly they cannot do justice to their children or to society. Thus may marriage lose half its significance by parting with all of its sanctity. And see, as to one's remaining on the other's premises, Chapman v. Chapman, 25 N. J. Eq. 394; Brown v. Smith, 83 Ill. 291.

51. Chapman v. Chapman, 25 N. J. Eq. 394.

52. Brown v. Smith, 83 Ill. 291. But if, with her husband's consent, she keeps possession of lands to which her husband holds the legal title, she is at least a tenant at will, and entitled to a notice to quit. Wilson v. Merrill, 38 Mich. 707.

53. Donovan v. Donovan, 77 A. 765; Chase v. Webster, 168 Mass. 228, 46 N. E. 705.

here being that the marriage remains in full force, although the parties are allowed to live separate. Here we must consult the phraseology of local statutes with especial care, in order to determine the respective rights and duties of the divorced parties. Thus the consequence of judicial separation, under the present divorce acts of England, is to give to the wife, so long as separation lasts, all property of every description which she may acquire, or which may come to or devolve upon her, including estates in remainder or reversion; and such property may be disposed of by her in all respects as if she were a *feme sole;* and if she dies intestate it goes as if her husband had then been dead.[54]

In this country, independently of statutory aid, the property rights of the parties divorced from bed and board remain in general unchanged. For this divorce is only a legal separation, terminable at the will of the parties; the marriage continuing in regard to everything not necessarily withdrawn from its operation by the divorce.[55] Thus, the husband still inherits from the wife, and the wife from the husband; the one takes his curtesy, the other her dower; and even the right of reducing the wife's *choses in action* into possession still remains to the guilty husband.[56] But chancery, by virtue of its jurisdiction in awarding the wife her equity to a settlement, may, and doubtless will, keep the property from his grasp, and do to both what justice demands.[57]

On principle, the husband's right to administer on his wife's estate would seem not to be forfeited by his divorce from bed and board. Nor the wife's on her husband's estate. But it should be remembered that the wife's claim to administer, unlike the husband's, is not superior, but only equal, to that of the next of kin. So, too, in the case of both husband and wife, divorce from bed and board may be thought a good reason why the court should

54. Stats. 20 & 21 Vict., ch. 85, § 25; 21 & 22 Vict., ch. 108, § 8. See Romilly, M. R., *In re* Insole, L. R. 1 Eq. 470.

55. Dean v. Richmond, 5 Pick. 461.

56. Clark v. Clark, 6 Watts & S. 85; Kriger v. Day, 2 Pick. 316; Smodt v. Lecatt, 1 Stew. 590; Ames v. Chew, 5 Met. 320.

57. Holmes v. Holmes, 4 Barb. 295.

refuse to issue letters of administration to the guilty party, where others are interested in the estate, and the judge has discretion in the matter of appointment.[58]

The English statutes give the wife, upon sentence of judicial separation, the capacity to sue and be sued on somewhat the same footing as a *feme sole*. The rule in the United States is not uniform; but the tendency is clearly in the same direction.[59]

A decree of limited divorce or separation does not dissolve the marriage ties and leaves the wife entitled to support,[60] and leaves the parties as they were before except as their condition is altered by the decree,[61] but in at least one State by statute the wife can sue the husband for a tort after a separation decree.[62] When the wife is given a limited divorce she is free to have a separate domicile.[63]

§ 1939. Status of Divorced Person.

The status of a divorced person is not clearly settled, but they will be regarded for most purposes as in the position of unmarried persons and as strangers to each other.[64]

§ 1940. Husband's Right to Administer.

Divorce takes away the husband's right of administration upon the estate of his divorced wife.[65]

58. Clark v. Clark, 6 Watts & S. 85. As to varying a postnuptial settlement after a divorce *nisi*, see Noakes v. Noakes, 39 L. T. 47.

59. Lefevres v. Murdock, Wright, 205; Clark v. Clark, 6 Watts & S. 85.

60. State v. Ellis, 50 La. Ann. 559, 23 So. 445; *contra*, Chapman v. Parsons, 66 W. Va. 307, 66 S. E. 461.

61. Dean v. Richmond, 22 Mass. (5 Pick.) 461; Drum v. Drum, 69 N. J. Law, 557, 55 A. 86 (wife cannot sue her husband); People v. Cullen, 153 N. Y. 629, 47 N. E. 894, 44 L. R. A. 420; *contra*, Chapman v. Chapman, 70 W. Va. 522, 74 S. E. 661. See Hellard v. Rockcastle Mining, Lumber & Oil Co., 153 Ky. 259, 154 S. W. 401.

62. Coffinbarger v. Coffinbarger, 180 Ky. 704, 203 S. W. 533.

63. Dixon v. Dixon, 177 N. Y. S. 63.

64. Commonwealth v. Richardson, 126 Mass. 34, 30 Am. R. 647.

A divorce decree has no retroactive effect, and does not *per se* legally restore the *status quo* of the parties before marriage, or annul their voluntary and legal acts during coverture. Reed v. Reed, 109 Md. 690, 72 A. 414.

65. Altemus's Case, 1 Ashm. 49;

§ 1941. Right to Marry in Absence of Prohibition.

In the absence of some statutory restriction either party may remarry after divorce.[66]

§ 1942. Title to Property; English Doctrine.

The effect of divorce from bonds of matrimony upon the property rights of married parties is substantially that of death, or rather annihilation. And, save so far as a statute may divide the property or restore to each what he or she had before, or a decree for alimony may fasten directly upon the property in question, the guilt or innocence of either spouse does not affect the case.[67] This is a topic upon which the common law, from the infrequency of divorce, furnishes no light, except by analogies. The settled usage of Parliament has been to introduce property clauses to the above effect into the sentence of dissolution, regulating the rights and liabilities of the respective parties.[68] Even in these cases the rights of divorced parties as to tenancy by the curtesy, chattels real, and rents of the wife's lands, are still unsettled; and, in general, the consequence by act of Parliament "does not very clearly appear."[69]

But under the English Divorce Act,[70] it is held that where the wife, at the date of the decree of divorce *a vinculo,* was entitled to a reversionary interest in a sum of stock which was not settled before her marriage, and had been the subject of a postnuptial settlement, and after the decree the fund fell into possession, her divorced husband had no right to claim it. Says Vice-Chancellor Wood: "Here the contract has been determined by a mode unknown to the old law, namely, by a decree of dissolution; and, as

West Cambridge v. Lexington, 1 Pick. 506; Buffaloe v. Whitedeer, 3 Harr. (Pa.) 182; Babcock v. Smith, 22 Pick. 61; Blaker v. Cooper, 7 S. & R. 500; Miller v. Miller, 1 Sand. Ch. 103; Clarke v. Lott, 11 Ill. 105. See Marriage Settlements, *supra.*

66. Whitsell v. Mills, 6 Ind. 229.

67. See Harvard College v. Head, 111 Mass. 209.

68. Macq. Hus. & Wife, 210, 214.

69. 2 Bright Hus. & Wife, 366.

70. Stats. 20 & 21 Vict., ch. 85; 21 & 22 Vict., ch. 108; 23 & 24 Vict., ch. 144.

the husband was unable during the existence of the contract to reduce this chattel into possession, I must hold that the property remained the property of the wife." [71] The English doctrine, as thus indicated, is that the same consequences as to property must follow the decree of dissolution by the divorce court, as if the marriage contract had been annihilated and the marriage tie severed on that date. Such, too, was the spirit of later decisions.[72] And one who obtained a sentence of dissolution of marriage was held, moreover, not liable to be joined in an action for tort committed by his wife during the coverture.[73]

But in settlements and trusts involving intricate family arrangements, the English rule is not yet uniform and positive. The cases show a decided indisposition to forfeit a husband's rights to a trust fund where, at all events, the effect of annihilation would be to disturb the remote right of some innocent party,[74] or without consideration as to which spouse offended. And in certain causes the Divorce Act [75] confers the power to modify the marriage settlement upon final sentence. Where application is made for that purpose, the judicial object of thus proceeding is, apparently, to prevent the innocent party from being injuriously affected in property by the decree.[76]

§ 1943. Title to Property; American Doctrine.

In this country, the effect of divorce *a vinculo* is frequently regulated by statute. And in general, and independently of statute, all transfers of property actually executed before divorce,

71. Wilkinson v. Gibson, L. R. 4 Eq. 162.

72. Pratt v. Jenner, L. R. 1 Ch. 493; Fussell v. Dowding, L. R. 14 Eq. 421; Swift v. Wenman, L. R. 10 Eq. 15; Prole v. Soady, L. R. 3 Ch. 220.

73. Capel v. Powell, 17 C. B. N. S. 743.

74. Fitzgerald v. Chapman, L. R. 1 Ch. D. 563. Jessel, M. R., here discredits Fussell v. Dowding, and other cases cited *supra*. And see Burton v. Sturgeon, L. R. 2 Ch. D. 318; Codrington v. Codrington, L. R. 7 H. L. 854.

75. 20 & 21 Vict., ch. 85, § 45.

76. Maudslay v. Maudslay, L. R. 2 P. D. 256. On the decree for dissolution of marriage becoming absolute, it takes effect from the date of the decree *nisi*. Prole v. Soady, L. R. 3 Ch. 220.

whether in law or in fact, remain unaffected by the decree. For instance, personal *choses* of the wife, already reduced to possession by the husband, remain his.[77] But as to rights dependent on marriage and not actually vested, a full divorce, or the legal annihilation, ends them. This applies to curtesy, dower, the right to reduce *choses* into possession, and property rights under the statutes of distribution.[78] These doctrines are set forth in local codes, which frequently save certain rights, such as the wife's dower where divorce is occasioned by her husband's misconduct. And a provision under an antenuptial contract, which is plainly intended as a substitute or equivalent for dower in case the wife survives the husband, is barred by their divorce.[79]

On divorce each party is restored to the property they held separately before divorce.[80] Upon the dissolution of the marriage all the husband's claims to the wife's lands, which depended on the marriage, become extinguished, and she is entitled to possession.[81] And her statutory disability to alienate such lands is removed.[82] The effect of divorce upon a lease given by husband and wife, of the wife's separate property, would be to put an end to the husband's interest, but continue the lease as binding upon the wife and those claiming under her.[83]

Separate property of a wife settled, or otherwise vested in her,

77. Lawson v. Shotwell, 27 Miss. 630.

78. Dobson v. Butler, 17 Mis. 87, 4 Kent Com. 53, *n.*, 54; Given v. Marr, 27 Me. 212; Wheeler v. Hotchkiss, 10 Conn. 225; Calame v. Calame, 24 N. J. Eq. 440; Hunt v. Thompson, 61 Mo. 148; Rice v. Lumley, 10 Ohio St. 596. But see Wait v. Wait, 4 Comst. 95.

79. Jordan v. Clark, 81 Ill. 465. Here divorce was granted to A. for the fault or misconduct of A.'s wife, but the principle of the case was that the wife could only be entitled to receive the provision as A.'s widow. A divorce *a vinculo* obtained by the wife, though for the husband's misconduct, bars dower. Calame v. Calame, 24 N. J. Eq. 440. And see Gleason v. Emerson, 51 N. H. 405; Hunt v. Thompson, 61 Mo. 148. Cf. New York statute, construed in Schiffer v. Pruden, 64 N. Y. 47.

80. Bowling v. Little (Ky.), 206 S. W. 1.

81. Porter v. Porter, 27 Gratt. 599.

82. Piper v. May, 51 Ind. 283.

83. Emmert v. Hays, 89 Ill. 11.

is not to be disturbed by a divorce. Thus, a husband's investment of property owned by his wife at the time of her marriage, as also the permitted proceeds of her separate earnings, in purchasing and improving real estate settled to her separate use, belong to her where creditors' rights have not been impaired;[84] and hence in case of a divorce granted to her afterwards for her husband's misconduct, his claim upon the fund will not be favorably regarded.[85] Deeds of settlement which expressly contemplate the survivorship, at a wife's death, of one who was her husband at the time of her death, by inference exclude from their benefits a man who has ceased to be such before her death, because of a full divorce.[86]

The title of money paid by a husband shortly after the divorce to the wife passes to her absolutely.[87]

§ 1944. Tenancy by Entireties.

Tenancy by entirety is changed by divorce to tenancy in common,[88] as divorce destroys the unity existing between them and

84. See Postnuptial Settlements, *supra*.

85. Jackson v. Jackson, 91 U. S. Supr. 122.

86. Barclay v. Waring, 58 Ga. 86; Harvard College v. Head, 111 Mass. 209.

In the case of a tenancy by the entirety having plain reference to a "survivorship," *i. e.* because of one's natural death, and not a conjugal survivorship, it would appear that divorce does not disturb the tenancy, but the joint tenancy lasts until one or the other party dies. See *supra*, 397; Lash v. Lash, 58 Ind. 526. And see Beach v. Hollister, 76 N. Y. 262; Ames v. Norman, 4 Sneed, 683. But it is held that the estate by entirety ceases so far on divorce as to make the late husband and wife tenants in common. Harrer v. Wallner, 80 Ill. 197. And income of property settled during "joint lives" is held to terminate, as in case of death. Highley v. Allen, 3 Mo. App. 521. *Sed qu.* Where, however, a conjugal survivorship was plainly specified in the trust, as in the instance of an annuity payable "during the continuance of the marriage," divorce, of course, ends it. Harvard College v. Head, 111 Mass. 209. Otherwise, as in case of entirety, the analogy of death does not appear conclusive.

87. Durland v. Durland, 67 Kan. 734, 74 P. 274, 63 L. R. A. 959.

88. Doherty v. Russell, 116 Me. 269, 101 A. 305; Aeby v. Aeby (Mo.), 192 S. W. 97; Moore v. Greenville Banking & Trust Company (N. C.), 100 S. E. 269; Sbarbaro v. Sbarbaro (N. J. Ch.), 102 A. 256.

operates to divide equally between them the title to the estate formerly held by them by entirety.[89]

Where an estate is conveyed to husband and wife as joint tenants and this relation is suspended by law, making them tenants by entireties, a divorce between them will restore the relation of joint tenants.[90]

§ 1945. Tenancy by Entireties; Conveyance by Husband; Limitations.

Where the husband has parted with his interest in the land before the procurement of the divorce, the decree of divorce is not effective to make the wife and the husband's vendees tenants in common. The husband's vendees stand in the same relation to the land that he occupied before the decree for divorce, and the husband's vendee is vested with the right of the husband as it existed at the time of the sale, and if the wife survives the husband, she becomes the absolute owner of the whole estate by right of survivorship. The death of one tenant by the entirety effects a change in the properties of the legal person holding, and reduces the legal personage holding the estate to an individuality identical with the natural person, and the estate of the survivor is freed from participation by the other.

The wife does not have a separate right to the possession of the whole estate until the death of her husband, at which time she becomes the separate owner of the whole property by right of survivorship. She would not, therefore, be barred by lapse of time reckoned from the date of the conveyance made by her husband,

89. Stelz v. Schreck, 128 N. Y. 263, 28 N. E. 510; Enyeart v. Kepler, 118 Ind. 34, 10 Am. St. R. 94, 20 N. E. 539; Joerger v. Joerger, 193 Mo. 133, 91 S. W. 918; Hopson v. Fowlkes, 92 Tenn. 697, 23 S. W. 55, 23 L. R. A. 805; Harrer v. Wallner, 80 Ill. 197; Hayes v. Horton, 46 Ore. 597, 81 P. 386; McKinnon v. Caulk, 167 N. C. 411, 83 S. E. 559, L. R. A. 1915C, 396; *contra, Re* Lewis, 85 Mich. 340, 24 Am. St. R. 94, 48 N. W. 580; Alles v. Lyon, 216 Pa. 604, 66 A. 81, 10 L. R. A. (N. S.) 463, 116 Am. St. R. 791.

90. Lash v. Lash, 58 Ind. 526; Maitten v. Barley, 174 Ind. 620, 92 N. E. 738.

and the statutory period would not begin to run until the death of her husband and she became entitled to the separate possession of the whole property by right of survivorship.[91]

§ 1946. Insurance for Benefit of Wife.

Divorce has no effect on a policy of life insurance in an old line company taken out by the husband, naming the then wife as beneficiary, where the husband, after the divorce, remarries and continues to pay the premiums, and makes no attempt to change the beneficiary. A legal proceeding like a divorce cannot be deemed to abrogate an existing contract in nowise involved in such proceeding. The rights of the company, the insured and the beneficiary became fixed upon the issuance of the policy, and they cannot be held to have become impaired by orderly litigation occurring afterwards over other matters. In this case, when the policy was taken out the husband was living on amicable terms with his wife, and there was no evidence that he at that time intended to provide for any future wife. The result is that the divorced wife remains the beneficiary.[92] But a wife named as beneficiary in a fraternal beneficiary certificate loses her rights when she obtains a divorce, as the object of such an order is to provide for the family of its members.[93]

§ 1947. Trusts.

Where a trust is created for the wife, with directions to pay the principal to her on the death of the husband, who is dissipated, the trust ceases on the divorce of the parties.[94] It is the general rule that where the object of a trust is to protect the property from the husband on divorce the reason for the trust ceases and therefore the trust ceases.[95]

91. Whitley v. Meador (Tenn.), 192 S. W. 718, L. R. A. 1917D, 736.

92. Filley v. Illinois Life Insurance Co., 91 Kan. 220, 137 P. 793, L. R. A. 1915D, 130.

93. Griffin v. Grand Lodge, etc. (Neb.) 157 N. W. 113, L. R. A. 1916D, 1168.

94. *Re* Cornils (Ia.), 149 N. W. 65, L. R. A. 1915E, 762.

95. Cary v. Slead, 220 Ill. 508, 77 N. E. 234; McNeer v. Patrick, 93

§ 1948. Rights of Action with Third Parties.

If the wife has received an injury and afterwards becomes divorced from bond of matrimony, she should sue the wrong-doer in her own name without the joinder of her husband;[96] while for injury committed by her the husband is not to be joined as a party liable in consequence;[97] finally, the husband's own action, growing out of injury done to his wife, by virtue of the injury to himself, appears to become impaired.

§ 1949. Rights of Action Inter Se.

It is held, and upon that principle of sound policy which maintains inviolate the sanctity of the marriage union while discouraging stale and doubtful litigation to which their final and angry rupture might incite one of the married parties, that a divorced wife cannot maintain an action against her divorced husband upon an implied contract arising during coverture,[98] nor for an alleged assault committed upon her while they were husband and wife,[99] and she cannot bring an action against him for maintenance.[1]

On the other hand, if the husband receives any property of the wife after divorce, she may recover it in a suit for money had and received,[2] and she may enforce a contract made with her husband for good consideration during marriage.[3] How far on the divorce of the husband his assignee may claim against the wife does not clearly appear, but where the divorce was obtained through his

Neb. 746, 142 N. W. 283; Lee's Estate, 207 Pa. 218, 56 Atl. 425.

96. Chase v. Chase, 6 Gray, 157; Houston & T. C. R. Co. v. Helm (Tex. Civ. App.), 93 S. W. 697. See State v. Carroll, 8 Mo. App. 603, memorandum.

97. This is English doctrine. See Capel v. Powell, 17 C. B. N. S. 743.

98. Pittman v. Pittman, 4 Ore. 298.

99. Abbott v. Abbott, 67 Me. 304; Bandfield v. Bandfield, 117 Mich. 80, 75 N. W. 287, 5 Det. Leg. N. 145, 72 Am. St. R. 550, 40 L. R. A. 757.

1. Magowan v. Magowan, 57 N. J. Eq. 195, 39 A. 364, reversed (1891) 57 N. J. Eq. 322, 42 A. 330, 73 Am. St. R. 645.

2. Legg v. Legg, 8 Mass. 99. See Kintzinger's Estate, 2 Ashm. 455.

3. Elliott v. Northern Trust Co., 178 Ill. App. 439; Taylor v. Taylor, 54 Ore. 560, 103 P. 524 (may recover rents he collected from her separate property).

fault, the wife's equitable provision, it seems, will be favorably regarded as against him.[4]

§ 1950. Decree Does Not Validate Prior Second Marriage.

Where the defendant in a divorce suit marries before the divorce decree the subsequent entry of that decree does not validate the marriage, and neither would the subsequent marriage of the successful plaintiff.[5]

§ 1951. Effect of Decree of Divorce for Duress in Obtaining Marriage.

A decree granting a divorce for duress in obtaining the marriage has the same effect as a judgment annulling the marriage.[6]

§ 1952. Remarriage of Parties with Each Other.

A remarriage of divorced persons annuls a judgment of divorce and reinstates the parent's rights with respect to their children as if no divorce had been granted.[7]

4. Woods v. Simmons, 20 Misc. 363; 2 Kent Com. 136 *et seq.*

5. Evans v. Evans (Ala.), 76 So. 95.

6. Shepherd v. Shepherd, 174 Ky. 615, 192 S. W 658.

7. Cain v. Garner (Ky.), 185 S. W. 122 L. R. A. 1916E, 682.

CHAPTER XLV.

FOREIGN JUDGMENTS.

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§ 1953. English Doctrine.

In England, jurisdiction, on the one hand, is cautiously assumed over the divorces of subjects from abroad; and, on the other, foreign divorces of British subjects are readily repudiated, according to the latest decisions. Thus, where husband and wife were married and resided abroad, and, the husband deserting her, the

wife came to England to live, the divorce court refused to take jurisdiction of a divorce suit on the wife's behalf, since the husband had never been domiciled in England;[8] and so, too, where the husband, who was a French subject, acted as a consul in England, and in that country committed adultery.[9] And while the English divorce courts recognize a Scotch divorce of domiciled persons who had been married in England[10] (for such judgment is pronounced within British jurisdiction), they treat with manifest disfavor a decree of divorce procured in one of the United States, especially if one spouse went to such State without the other, and there was no positive change of domicile or transfer of allegiance.[11]

It may be safely stated generally that the English courts decline to recognize a foreign decree of divorce as having extraterritorial force when both parties to the marriage were not subject to the jurisdiction of the court which rendered the decree.[12]

§ 1954. Foreign Judgment of Court Having Jurisdiction of Parties.

A divorce rendered by a court which has jurisdiction of the parties will be recognized in another jurisdiction,[13] even when

8. Le Soeur v. Le Soeur, 1 P. D. 139.

9. Niboyet v. Niboyet, L. R. 3 P. D. 52.

10. Harvey v. Farine, L. R. 5 P. D. 153, and cases cited in the elaborate opinion.

11. Briggs v. Briggs, L. R. 5 P. D. 153; Shaw v. Attorney-General, L. R. 2 P. D. 156. A Turkish divorce, procured by an Ottoman subject who had married an English woman, was not permitted to operate upon the property rights of the latter to the full extent of Turkish law, in Collis v. Hector, L. R. 19 Eq. 334.

12. Shaw v. Gould, L. R. 3 H. L. 55; Harvie v. Farnie, 8 App. Cas. 43.

13. McLoughlin v. McLaughlin (Ala.), 79 So. 354; McGrew v. Mutual Life Ins. Co. of New York, 132 Cal. 85, 64 P. 103, 84 Am. St. R. 20; Warren v. Warren (Fla.), 75 So. 35, L. R. A. 1917E, 490; Field v. Field, 117 Ill. App. 307, judgment affirmed 215 Ill. 496, 74 N. E. 443; Phillips v. Phillips, 69 Kan. 324, 76 P. 842; Zavaglia v. Notarbartolo, 137 La. 722, 69 So. 152; Walker v. Walker, 125 Md. 649, 94 A. 346; State v. District Court of Tenth Judicial Dist. in and for Fergus County, 128 P. 590; *Ex parte* Alderman, 157 N. C. 507, 73 S. E. 126; Freund v. Freund, 72 N. J. Eq. 943, 73 A. 1117; Guggenheim v. Wahl, 203

granted for a cause not recognized in the jurisdiction where the question comes up.[14]

A judgment of a foreign court is entitled to the presumption that it was authorized by law,[15] but it is not evidence to be used in an action for alienation of affections between other parties.[16]

Where the present defendant in a suit for alimony had previously brought suit in Cuba, alleging that he was there domiciled and asking that his marriage to this plaintiff in Cuba be annulled on the ground that he had already been married in this State to her, and he obtains a decree of annulment from the Cuban court, this Cuban decree is binding in this proceeding. But the very decree which declared the Cuban ceremony to have been void declares the parties to be husband and wife under the law of Cuba and therefore is no defence to this suit.[17]

N. Y. 390, 96 N. E. 726, affirming judgment (1910) 124 N. Y. S. 1116, 139 App. Div. 931; Tiedemann v. Tiedemann, 158 N. Y. S. 851, 172 App. Div. 819, 156 N. Y. S. 111, 92 Misc. 417; Kaufman v. Kaufman, 160 N. Y. S. 19; Strauss v. Strauss, 107 N. Y. S. 842, 122 App. Div. 729; Richards v. Richards, 149 N. Y. S. 1028, 87 Misc. 134; Curnen v. Curnen, 140 N. Y. S. 805, 155 App. Div. 536; Rupp v. Rupp, 141 N. Y. S. 484, 156 App. Div. 389 (even if divorce collusive it cannot be collaterally attacked); French v. French, 131 N. Y. S. 1053, 74 Misc. 626; Guggenheim v. Walh, 122 N. Y. S. 941, 138 App. Div. 269; Hall v. Hall, 123 N. Y. S. 1056, 139 App. Div. 120, reversing judgment 122 N. Y. S. 401, 67 Misc. 267; Saperstone v. Saperstone, 131 N. Y. S. 241, 73 Misc. 631 (foreign rabbinical divorce); Miller v. Miller, 128 N. Y. S. 787, 70 Misc. 368 (Russian rabbi divorce); Post v. Post, 129 N. Y. S. 754, 71 Misc. 44; People v. Shrady, 95 N. Y. S. 991, 47 Misc. 333; Gilbert v. Gilbert, 83 Ohio St. 265, 94 N. E. 421; Cunningham v. Cunningham, 5 Ohio App. 318; Commonwealth v. Parker, 59 Pa. Super. Ct. 74; Kelly v. Kelly, 87 S. E. 567; Hicks v. Hicks, 69 Wash. 627, 125 P. 945; Zentzis v. Zentzis, 163 Wis. 342, 158 N. W. 284; *contra*, Adams v. Adams, 154 Mass. 290, 28 N. E. 260, 13 L. R. A. 275. See Carter v. Carter, 89 Kan. 367, 131 P. 561.

14. Succession of Benton, 106 La. 494, 31 So. 123, 59 L. R. A. 135; Clarke v. Clarke, 62 Mass. (8 Cush.) 385; Barber v. Root, 10 Mass. 260.

15. *In re* Hancock's Estate, 156 Cal. 804, 106 P. 58.

16. De Ford v. Johnson, 177 S. W. 577.

17. Warren v. Warren (Fla.), 75 So. 490, L. R. A. 1917E, 490.

§ 1955. Indian Divorce.

An Indian divorce according to tribal customs will be recognized.[18] So a divorce according to the Indian customs and laws terminates the marriage relation so long as the parties are still members of Indian tribes recognized by the government as distinct political communities, even though the divorce consists in a mere desertion by the husband. There is no difference whether the husband is a full-blooded Indian or a half-breed, or even a white man. If he marries an Indian woman and lives with her in the tribal haunts, and is there divorced according to the Indian custom, the same principle which recognizes the marriage as valid and the children as legitimate also recognizes the divorce. It is different when the parties leave the Indian haunts and customs and go to dwell in civilization. They then become subject to the laws of civilization.[19]

§ 1956. Analysis of Status of Foreign Divorce.

There are four different situations under which the question of the recognition of the foreign divorce may arise.

First, where the husband obtains a decree in a State where the parties were last living together, commonly called the State of the matrimonial domicile. Such a decree, though rendered on constructive service, is entitled to full faith and credit under the Federal Constitution.[20]

Second, where the wife obtains a decree by constructive service in the State of the matrimonial domicile. The prevailing view seems to be that where the husband leaves the wife without justification the matrimonial domicile stays with the wife, and a decree in that State on constructive service is binding anywhere.[21]

18. La Framboise v. Day, 136 Minn. 239, L. R. A. 1917D, 571, 161 N. W. 529; James v. Adams, 56 Okla. 450, 155 P. 1121.

19. La Framboise v. Day (Minn.), 161 N. W. 529, L. R. A. 1917D, 571.

20. Thompson v. Thompson, 226 U. S. 551, 33 Sup. Ct. R. 129, 57 L. Ed. 347.

21. Hall v. Hall, 123 N. Y. S. 1056, 139 N. Y. App. Div. 120; Parker v. Parker, 222 Fed. 186, 137 C. C. A. 626.

Third, where the husband obtains a decree in the State where he lives after the separation. Such a decree is not binding either in the State of the matrimonial domicile or elsewhere.[22]

Fourth, where the wife leaves her husband and obtains a divorce on constructive service in the State to which she separates. Such a divorce is *a fortiori* void everywhere except in the State where obtained.[23]

We shall in the following pages consider more in detail these four situations.

§ 1957. History of Views of Supreme Court.

If the framers of the Federal Constitution had made divorce a Federal question instead of leaving jurisdiction with the States, much of our present divorce evil would be avoided. They could not foresee that the thirteen colonies would grow and expand into a great nation of forty-eight States, each having its own laws and jurisdiction in divorce. They could not foresee that divorces, then comparatively rare, would grow into a great national evil, and that certain States should vie with each other by the passage of lax divorce laws to aid those of unstable or evil minds to free themselves from the shackles they may have lightly assumed.

The questions at issue are simple; only the results are complicated. If both parties are living in the same State there is obviously no difficulty. If they have separated and one lives in one State and the other lives in another, what court may grant the divorce? Here is the meeting point of two conflicting theories of jurisdiction: first, that no judgment is good without personal service, and second, that marriage is a *res* and that the court of the matrimonial jurisdiction has full jurisdiction. The requirement of the Federal Constitution that full faith and credit shall be given to foreign judgments of another State was in recent times

22. Perkins v. Perkins (Mass.), 113 N. E. 841, L. R. A. 1917B, 1028.

23. Matthews v. Matthews, 139 Ga. 123, 76 S. E. 855; Baylis v. Baylis, 207 N. Y. 446, 101 N. E. 176; Blondin v. Brooks, 83 Vt. 476, 76 A. 184.

held not to apply to a judgment granted without personal service.[24] Is judgment in divorce of that nature?

In the first great case where the question arose our Supreme Court seemed to answer that question in the negative,[25] but in the later and decisive Haddock case[26] the court took the opposite view and has affirmed this by later decisions.[27] When the Haddock case was decided there had grown up in most of the States elaborate systems by statute and practice of proceedings in divorce in the absence of personal service, and it was at first assumed that all this law was now in the waste-basket, but no such result was intended by the court or has in effect taken place. What the court in the Haddock case said was that a State need not recognize a foreign divorce obtained without personal service by a husband who had left the matrimonial domicile, but might do so if it desired, and most States have gone right on rendering such decrees and recognizing those of other States. It is said that the Haddock case has changed the law only in four States, namely, New York, North Carolina, Pennsylvania and South Carolina, which now decline to recognize foreign divorces obtained without personal service by spouses who have left the matrimonial domicile.[28]

The validity of such divorces seems now to depend on whether action is brought at the matrimonial domicile or not. The final outcome of the controversy seems to be that if the spouse leaves the State where they are living together (the wife leaving for good cause) and goes to another State, and there obtains a divorce on substituted service, he can obtain a divorce which the first State may but does not need to recognize,[29] while the spouse who remains

24. Pennoyer v. Neff, 95 U. S. 714.

25. Atherton v. Atherton, 181 U. S. 155, 21 S. Ct. 544, 45 L. Ed. 794, 40 L. R. A. 291, reversing 155 N. Y. 129, 49 N. E. 933.

26. Haddock v. Haddock, 201 U. S. 562, 26 S. Ct. 525, 50 L. Ed. 867, affg. 178 N. Y. 557, 70 N. E. 1099.

27. Thompson v. Thompson, 226 U. S. 551, 33 S. Ct. 129, 57 L. Ed. 347.

28. See learned article by Robert J. Peaslee in 28 Harvard Law Review, 457, 459.

29. Haddock v. Haddock, 201 U. S. 562.

in the State of the domicile may obtain a divorce which must be recognized everywhere.[30]

If the reader will bear in mind the above course of decisions in our highest court he will have no difficulty in understanding the mysteries of the subject as set forth in the following pages.

§ 1958. Effect of Federal Constitution.

Under the full faith and credit clause of the Federal Constitution a divorce granted in another State may be attacked for want of jurisdiction.[31]

The States at the time of the adoption of the Federal Constitution possessed full power over the subject of marriage and divorce, and before the adoption of the Constitution the extent to which the States would recognize a divorce obtained in a foreign jurisdiction depended on their conceptions of duty and comity. The Federal Constitution delegated to the Federal Government no authority on the subject of marriage and divorce, and the Full Faith and Credit clause of the instrument did not destroy the authority of the States over the marriage relation.[32]

§ 1959. Recognition of Foreign Divorce Depends on Law of State Where Question Arises.

The recognition of a divorce granted by a court of a foreign

30 Atherton v. Atherton, 181 U. S. 155; Thompson v. Thompson, 226 U. S. 551.

31. Bell v. Bell, 181 U. S. 175, 21 S. Ct. 551, 45 L. Ed. 804, affg. 157 N. Y 719, 53 N. E. 1123; Ferry v. Troy Laundry Co. (U. S. D. C.), 238 F 867; Steinbroner v. Steinbroner, 30 Cal App 673, 159 P. 235; Field v. Field, 215 Ill. 496, 74 N. E. 443, affirming judgment 117 Ill. App. 307; Raymond v. Raymond (Ind. T.), 37 S. W. 202, Chapman v. Chapman, 224 Mass. 427, 113 N. E. 359; Wright v. Wright, 24 Mich. 180; McHenry v. Brackin, 93 Minn. 510, 101 N. W. 960; Weaver v. Weaver, 160 N. Y. S. 642, 96 Misc. 476; *In re* Heins' Estate, 22 Pa. Super. Ct. 31; Jones v. Bartlett (Tex. Civ. App.), 189 S. W. 1107; Deyette v. Deyette (Vt.), 104 A. 232; Wick v. Dawson, 48 W. Va. 469, 37 S. E. 639. See Potts v. Potts (N. J. Ch. 1899), 42 A. 1055; Stuart v. Cole (Tex. Civ. App. 1906), 92 S. W. 1040.

32. Haddock v. Haddock, 201 U. S. 562, 577, 26 Sup. Ct. 525.

country depends on the law of the State where the question arises.[33]

§ 1960. Jurisdiction Over Non-Residents in General.

The mere domicile within the State of one party to a marriage does not give the courts of that State jurisdiction to render a divorce decree against a non-resident who did not appear and was only constructively served with process which the courts of other States are bound to recognize.[34]

§ 1961. Necessity of Service.

A divorce decree, except by the court of the matrimonial jurisdiction, is invalid where the defendant never appeared and never was served with process,[35] and where a husband deserts his wife and goes to another State, where he obtains a divorce without actual service on or appearance by wife, such divorce is void in the first State.[36]

A divorce obtained without personal service in a State which is not that of the matrimonial domicile is void,[37] but a divorce decree will be recognized where obtained in the foreign State where the

33. Lie v. Lie, 159 N. Y. S. 748, 96 Misc. 3; *In re* Spondre, 162 N. Y. S. 943, 98 Misc. Rep. 524 (Russian rabbinical divorce recognized).

34. Haddock v. Haddock, 26 S. Ct. 525, 201 U. S. 562, 50 L. Ed. 867, affg. 178 N. Y. 557, 70 N. E. 1099.

35. Pettis v. Pettis, 91 Conn. 608, 101 A. 13; Keenan v. Keenan (Nev.), 164 P. 351; Olmsted v. Olmsted, 190 N. Y. 458, 83 N. E. 569; *In re* Kimball's Estate, 46 N. Y. S. 177, 18 App. Div. 320, 155 N. Y. 62, 49 N. E. 331; *In re* Higgins, 121 N. Y. S. 907, 65 Misc. 415.

36. Bruguiere v. Bruguiere, 172 Cal. 199, 155 P. 988; Ackerman v. Ackerman, 93 N. E. 192, 200 N. Y. 72, affirming judgment (1908) 108 N. Y. S. 534, 123 App. Div. 750; Halter v. Van Camp, 118 N. Y. S. 545, 64 Misc. 366; Gouch v. Gouch, 127 N. Y. S. 476, 69 Misc. 436; *In re* Akin's Estate, 152 N. Y. S. 310, 89 Misc. 690; *In re* Grossman's Estate (Pa.), 106 A. 86, 88; Toncray v. Toncray, 123 Tenn. 476, 131 S. W. 977.

37. Bell v. Bell (U. S. Sup. N. Y. 1901), 181 U. S. 175, 21 S. Ct. 551, 181 U. S. 175, 45 L. Ed. 804; Perkins v. Perkins, 225 Mass. 82, 113 N. E. 841; Bell v. Bell, 157 N. Y. 719, 53 N. E. 1123, affd. 21 S. Ct. 551, 181 U. S. 175, 45 L. Ed. 804; Baylis v. Baylis, 207 N. Y. 446, 101 N. E. 176, affirming judgment 131 N. Y. S. 671, 146 App. Div. 517; State v. Duncan (S. C.), 96 S. E. 294.

plaintiff was resident and service was actually made on the defendant.[38]

The courts in some States have taken jurisdiction of a non-resident on constructive service although the marriage was not solemnized in the State and no matrimonial domicile has been had therein.[39]

§ 1962. Service at Last and Usual Place of Abode.

Service at the last and usual place of abode will be sufficient where the defendant was actually a resident of the State at the time.[40]

§ 1963. Effect of Appearance of Non-Resident or Personal Service.

Courts have no jurisdiction unless at least one of the parties is domiciled in the State, and the appearance of the defendant will give no jurisdiction where the plaintiff was a non-resident,[41] but where a divorce suit is brought in a court which has no jurisdiction of the defendant the decree will nevertheless be binding where the defendant appears and defends the case,[42] or where the defendant is personally served in the State.[43]

§ 1964. Service by Publication.[44]

Divorce may be granted by a court of a State of which the plaintiff is a resident even though on constructive service by publica-

38. Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 A. 684; Felt v. Felt, 59 N. J. Eq. 606, 45 A. 105, 83 Am. St. R. 612, 47 L. R. A. 546, affg. 57 N. J. Eq. 101, 40 A. 436.

39. Schafer v. Ritchie, 49 Utah, 111, 162 P. 618. See, however, decisions of the United States Supreme Court, *supra*, § 1957.

Such a divorce need not be recognized elsewhere, see *post* § 1964.

40. Hamill v. Talbott, 72 Mo. App. 22.

41. Worthington v. District Court of Second Judicial District in and for Washoe County, 37 Nev. 212, 142 P. 230.

42. Morrill v. Morrill, 83 Conn. 479, 77 A. 1; Pearson v. Pearson, 176 N. Y. S. 626.

43. Bethard v. Bethard, 90 A. 406.

44. See *ante*, § 1961.

tion,[45] but where service is by publication only the full faith and credit clause of the Federal Constitution does not compel a foreign court to recognize it unless granted by the court of the matrimonial domicile, but still they may do so as a matter of comity if in accordance with their policy,[46] although the defendant was in fact actually in the State which granted the divorce at the time.[47]

The statutes governing service by publication commonly provide some effort in addition to advertisement to warn the absent party, either by registered mail or personal service, and a divorce by publication may not be recognized where the record shows a lack of proof of service by publication,[48] or where the record shows a lack of the proper affidavit for the publication of the summons.[49] Mailing a letter to an absent defendant at her true residence is such an effort to give her actual notice as will make the decree binding.[50]

A law providing for personal service in civil suits does not apply

45. Thompson v. Thompson, 35 App. D. C. 14; Dunham v. Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70; McCormick v. McCormick, 82 Kan. 31, 107 P. 546; Miller v. Miller, 89 Kan. 151, 130 P. 681; Eldred v. Eldred, 62 Neb. 613, 87 N. W. 340; Lacey v. Lacey, 77 N. Y. S. 235, 38 Misc. 196; Callahan v. Callahan, 121 N. Y. S. 39, 65 Misc. 172; Hall v. Hall, 122 N. Y. S. 401, 67 Misc. 267, judgment reversed 123 N. S. S. 1056, 139 App. Div. 120; Hammond v. Hammond, 93 N. Y. S. 1, 103 App. Div. 437; Hicks v. Hicks, 69 Wash. 627, 125 P. 945; Douglas v. Teller, 53 Wash. 695, 102 P. 761; *contra*, Hamilton v. Hamilton, 56 N. Y. S. 122, 26 Misc. 336. See Silvey v. Silvey, 180 S. W. 1071 (failure of summons to state nature of action is not conclusive).

46. Matthews v. Matthews, 139 Ga. 123, 76 S. E. 855; Joyner v. Joyner, 131 Ga. 217, 62 S. E. 182, 18 L. R. A. (N. S.) 647 (as a matter of comity and not of right, where no fraud appears); Howard v. Strode, 242 Mo. 210, 146 S. W. 792, 799; Ball v. Cross, 174 N. Y. S. 259; People v. Catlin, 126 N. Y. S. 350, 69 Misc. 191; Barber v. Barber, 151 N. Y. S. 1064, 89 Misc. 519; Givens v. Givens (Tex. Civ. App.), 195 S. W. 877; Buckley v. Buckley, 50 Wash. 213, 96 P. 1079 (by comity).

47. McHenry v. Brackin, 93 Minn. 510, 101 N. W. 960.

48. Forrest v. Fey, 218 Ill. 165, 75 N. E. 789, 1 L. R. A. (N. S.) 740, 109 Am. St. R. 249.

49. *In re* Pusey's Estate (Cal.), 181 P. 648.

50. Atherton v. Atherton (U. S. Sup. N. Y. 1901), 181 U. S. 155, 45 L. Ed. 794, reversing 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. R. 650.

to divorce, and does not prevent service in divorce by publication.[51] Furthermore, the mere temporary absence of a spouse from the State does not render her a non-resident to justify service by publication,[52] and where one spouse is confined by the other in an insane asylum in another State he cannot be proceeded against as a non-resident.[53]

§ 1965. Personal Service Outside State.

The strongest possible case for a foreign judgment is made out where personal service on the non-resident is made on him in his own State. Here he cannot claim that the proceedings are a fraud or that he had no opportunity to protect himself, and judgments so obtained are recognized even in States which do not recognize judgments obtained on service by publication.[54] So when the State law requires personal service on the non-resident a divorce obtained without it is void.[55]

§ 1966. Matrimonial Domicile; What Constitutes.

Marriage is now so far considered a *res* and divorce a proceeding *in rem* that the court of the matrimonial domicile may pronounce a judgment in divorce which will be recognized elsewhere, even without personal service. Matrimonial domicile usually means the place where the parties have last lived together as husband and wife, and it has been suggested that its true meaning is "where

51. White v. White, 2 Ind. T. 35, 47 S. W. 355.

52. State v. Giroux, 19 Mont. 149, 47 P. 798.

53. Newcomb's Ex'rs v. Newcomb, 76 Ky. (13 Bush) 544, 26 Am. St. R. 222.

54. Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 A. 684; Post v. Post, 133 N. Y. S. 1057, 149 App. Div. 452, affirming judgment 129 N. Y. S. 754, 71 Misc. 44; Benham v. Benham, 125 N. Y. S. 923, 69 Misc. 442. See, however, Gebhard v. Gebhard, 54 N. Y. S. 406, 25 Misc. 1 (holding that personal service in New York on a New York defendant will not give the courts of another State jurisdiction to render a divorce which New York will recognize).

55. Bentley v. Hosmer, 110 Mich. 626, 68 N. W. 650, 3 Det. Leg. N. 521; Winston v. Winston, 165 N. Y. 553, 59 N. E. 273, 31 Civ. Proc. L. 393.

one spouse is rightfully domiciled and where the other ought to be to fulfill the marital obligations."[56] But the mere fact that the parties were married in a State does not render that the State of the matrimonial domicile so as to make its judgment binding in another State, where the parties had always lived in the second State.[57]

As affecting jurisdiction to grant a divorce on constructive service, the domicile of the abandoned spouse becomes the matrimonial domicile, and so where a wife has been abandoned and moves to another State, and the whereabouts of the husband is unknown, she may there obtain a divorce by constructive service.[58]

Where the parties separate by agreement even the husband cannot establish a matrimonial domicile to give the courts of that State where he lives jurisdiction to grant a divorce without personal service, according to the New York rule.[59]

§ 1967. Matrimonial Domicile; What Court May Decide on.

The court of the State of the domicile of a man has a right to deny recognition to a decree of a foreign State as to his matrimonial status unless he has changed his domicile,[60] as the domicile alleged in the divorce decree may be denied,[61] and good faith in

56. Robert J. Peaslee in 28 Harvard Law Review, 457, 469.

57. Pettis v. Pettis, 91 Conn. 608, 101 A. 13.

58. Montmorency v. Montmorency (Tex. Civ. App. 1911), 139 S. W. 1168.

59. Licht v. Licht, 150 N. Y. S. 643, 88 Misc. 107.

60. Lister v. Lister, 86 N. J. Eq. 30, 97 A. 170.

61. Parker v. Parker, 222 F. 186, 137 C. C. A. 626; German Savings & Loan Soc. v. Dortmitzer, 192 U. S. 125, 24 S. Ct. 221, 48 L. Ed. 373, affg. 23 Wash. 132, 62 P. 862 (although record shows domicile); Andrews v. Andrews, 176 Mass. 92, 57 N. E. 333, affd. 188 U. S. 14, 23 S. C. 237, 47 L. Ed. 366; McGrew v. Mutual Life Ins. Co. of New York, 132 Cal. 85, 64 P. 103, 84 Am. St. R. 20; Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 A. 684; Dunham v. Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70; Walker v. Walker, 125 Md. 649, 94 A. 346; Kendrick v. Kendrick, 188 Mass. 550, 75 N. E. 151; Magowan v. Magowan (N. J. 1899), 42 A. 330; Lister v. Lister, 86 N. J. Eq. 30, 97 A. 170; Starbuck v. Starbuck, 74 N. Y. S. 104, 62 App. Div. 437, 10 N. Y. Ann. Cas. 146, reversed (1903) 173 N. Y. 503, 66 N. E. 193,

the acquisition of domicile may be attacked[62] by showing that obtaining a divorce there was the sole reason for residence.

§ 1968. Rights of Court of Matrimonial Domicile.

The hardships of separation are practical and real, and the courts have done their best to solve them in a practical way. Some court somewhere should have the right to decide on the matrimonial status where parties have separated and are living in different States. It will not do to say that, as in other personal actions, the dutiful spouse must chase her erring mate and sue him where she can catch him. This would be impractical in many cases where the spouse takes flight and utterly disappears, and would be in any event a great hardship on a wife left suddenly without means even of support and with no facilities to hire detectives to ascertain the whereabouts of her recreant husband. One of the further difficulties of the situation is that if a husband who has been deserted by his wife cannot obtain a binding decree in his own State he is without remedy as if he sues his wife in the State where she is living, by that very act he would admit that she had obtained a separate domicile, and this would disprove his own cause of action that she had abandoned him in the State of his domicile.[63]

Hence the rule as to notice necessary to give full effect to a decree of divorce is different from that which is required in suits *in personam*. The rule of *Pennoyer* v. *Neff*, that a judgment of a State court on a debt cannot be supported without personal service on the defendant within the State or his appearance in the

93 Am. St. R. 631; Buxbaum v. Mason, 95 N. Y. S. 539, 48 Misc. 396; State v. Westmoreland, 76 S. C. 145, 56 S. E. 673, 8 L. R. A. (N. S.) 842; Blondin v. Brooks, 83 Vt. 472, 76 A. 184; *contra*, Miller v. Miller, 89 Kan. 151, 130 P. 681.

62. Bruguiere v. Bruguiere, 172 Cal. 199, 155 P. 988; Succession of Benton, 106 La. 494, 31 So. 123, 59 L. R. A. 135; Lieber v. Lieber, 239 Mo. 1, 143 S. W. 458; State v. Herren, 175 N. C. 754, 94 S. E. 698; Rontey v. Rontey, 166 N. Y. S. 818, 101 Misc. 166 (where libellant went to foreign State for sole purpose of obtaining divorce).

63. Per Gray, J., in Atherton v. Atherton, 181 U. S. 155, 173.

cause, does not apply to divorce suits, as the jurisdiction which every State has to determine as to the civil status of its inhabitants involves authority to prescribe the conditions upon which the proceedings affecting them may be carried on within their own territory. So, where a wife leaves a husband and goes to another State, a divorce he obtains through constructive service in accordance with the laws of his State of domicile is good anywhere, even in the State where she is living and although she has there started proceedings, claiming that she left her husband for good reason.[64] And it seems to be now the settled doctrine of our Supreme Court that a foreign divorce decree is entitled to full faith and credit only when it is granted by the State of the matrimonial domicile or is based on personal service on one not domiciled within the jurisdiction granting the decree,[65] and in the majority of courts in this country divorce is held to be *in rem*, and therefore if one party be domiciled within the jurisdiction the other may be served by constructive service.[66]

§ 1969. The New York Rule.

The New York courts, however, have for a long time contended that divorce proceedings were *in personam*, and that therefore no foreign divorce would be recognized unless the defendant was personally served.[67] But this doctrine seems now to be confined to cases where the defendant who was not personally served was a resident of the State of New York.[68]

It is the New York rule that an action of divorce is one *inter*

64. Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544.

65. Thompson v. Thompson, 226 U. S. 551, 33 Sup. Ct. 129. See 26 Harvard Law Review, 449.

66. *In re* James Estate, 99 Cal. 374, 33 P. 1122; Dunham v. Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70; Dickinson v. Dickinson, 167 Mass. 474, 45 N. E. 1091; Perkins v. Perkins, 225 Mass. 82, 113 N. E. 841; Loker v. Gerald, 157 Mass. 42, 31 N. E. 709; Stuart v. Cole (Tex. Civ. App. 1906), 96 S. W. 1040.

67. Winston v. Winston, 165 N. Y. 553, 54 N. Y. Supp. 298; Ackerman v. Ackerman, 108 N. Y. S. 534, 123 App. Div. 750. See *post*, § 1979.

68. Kaufman v. Kaufman, 160 N. Y. S. 19.

parties, and the marriage relation is not a *res* within the State of the party invoking the jurisdiction of a court to dissolve it so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service or actual notice of the proceeding given without the jurisdiction of the court where the proceeding is pending.[69] So, where the husband, a resident of New York, went to another State and there secured a divorce on constructive service, this decree is no bar to a subsequent action by the wife for divorce in New York. The adjudication of the foreign court that he left her for her fault is not binding on the New York courts.[70]

Even in New York, however, the court is now bound to recognize a foreign divorce granted by the court of the matrimonial domicile, as this is the rule laid down by the United States Supreme Court,[71] but the New York court reserves to itself the right to decide whether the decision of the foreign court as to where the matrimonial domicile exists is correct or not. But now even in New York a decree obtained in the domicile of the husband and also matrimony is valid everywhere although obtained only on constructive service in the absence of the wife, as the court may disregard a wife's unjustifiable absence from the State and treat her as having a domicile in the State for the purpose of divorce.[72]

§ 1970. Wife's Independent Domicile.

There are some situations where the wife can acquire an independent domicile for purposes of divorce, and the usual test is the fault of the parties. If the wife wrongfully leaves the husband she can acquire no separate domicile, while if he deserts her, or if

69. Jones v. Jones, 108 N. Y. 415, 424; Ransom v. Ransom, 109 N. Y. S. 1143, 125 App. Div. 915; Hall v. Hall, 122 N. Y. S. 401, 67 Misc. 267, judgment reversed 123 N. Y. S. 1056, 139 App. Div. 120; Sterry v. Sterry, 140 N. Y. S. 716, 79 Misc. 355; Bailie v. Bailie, 52 N. Y. S. 228, 30 App. Div. 461; Tysen v. Tysen, 125 N. Y. S. 479, 140 App. Div. 370.

70. Rontey v. Rontey, 166 N. Y. Supp. 818.

71. See *ante,* § 1957.

72. Post v. Post, 105 N. Y. S. 910, 55 Misc. 538; Harry v. Dodge, 123 N. Y. S. 37, 66 Misc. 302.

she leaves him for good cause, her own separate domicile will be recognized. Hence, in this country a wife who leaves a husband for good cause may obtain a new domicile for divorce or for suit for other purposes,[73] and where a wife has acquired a domicile independent from her husband a divorce obtained by him without personal service in his domicile is void.[74]

Where the husband left the wife and went to another State, and there obtained a divorce, such decree is not a bar to an action for divorce by the wife in the State of the matrimonial domicile,[75] and likewise a decree of divorce in a State to which the wife had removed pending a suit by the husband in the State of his residence cannot be pleaded in bar of the husband's suit.[76] So, where a husband and wife are domiciled together in one State, and the husband leaves the wife and acquires in good faith a domicile in another State, and obtains there a divorce based on constructive service in accordance with the laws of that State, and the wife remains in the State of their domicile and brings suit there for divorce and obtains personal service on the husband, the court holds that the decree obtained by the husband is not such that the court of the domicile is bound to recognize it. The court does not question the right of the court which rendered the decree to enforce it within its own borders, or the right of the State of the domicile to recognize it as far as its own public policy might require.[77]

Where parties were married and lived as husband and wife in one State, and the husband deserts the wife and goes in good faith to another State, not for the purpose of obtaining a divorce, and becomes a citizen of that State, and there obtains a divorce, giving notice in accordance to the laws of that State, but without the

73. Williamson v. Osenton, 232 U. S. 619.

74. Saperstone v. Saperstone, 131 N. Y. S. 241, 73 Misc. 631.

75. Perkins v. Perkins, 225 Mass. 82, 113 N. E. 841.

76. Dunham v. Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70.

77. Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525. This is the decision which is commonly referred to as having held that a man might be

wife having actual notice of the proceedings, the divorce will not be recognized in the first State, and the wife may there obtain a divorce for desertion. The wife was innocent of any marital wrong when her husband deserted her, and therefore her domicile did not follow his when he went to the second State, but she was legally entitled to retain her matrimonial domicile in the State of her domicile. Where the parties are married in one State and there establish a matrimonial domicile, which is retained by one spouse, who is innocent of any marital wrong, and which is abandoned by the other, who is guilty of marital wrong, then the courts of the State of the matrimonial domicile have jurisdiction over the marriage relation and can proceed to adjudicate respecting it, although the other spouse had left that jurisdiction and cannot be reached by formal process. Thus courts of the State of the matrimonial domicile, at the petition of one spouse retaining that domicile and innocent of any marital wrong, stand upon firmer ground than the courts of any other State in respect of jurisdiction over the marriage status. This decision is made on general principles, and not under any statute, as it would be an unseemly result if the husband could return to the first State and establish there a new and lawful marriage relation directly in the face of a faithful wife whom he had deserted.[78]

§ 1971. Court May Decline to Protect Non-Resident Against Void Divorce.

Even courts of a State which protects its residents against a divorce granted without proper service may refuse to protect a non-resident.[79]

§ 1972. Burden of Proof.

It seems to be the general rule that a foreign decree duly proved and presented is on its face entitled to respect, and the burden

married in one State and not in another.

78. Perkins v. Perkins (Mass.), 113 N. E. 841, L. R. A. 1917B, 1028.

79. Percival v. Percival, 186 N. Y. 587, affg. 94 N. Y. S. 909, 106 App. Div. 111; Kaufman v. Kaufman, 160 N. Y. S. 19.

rests on one who attacks it as being made on insufficient service or as being void on other grounds, and the burden is on one claiming that a foreign divorce decree was obtained without proper service.[80]

For example, one who attacks, before the New York courts, a foreign divorce as being made without jurisdiction has the burden of showing that at the time the divorce was rendered he was a resident of New York to entitle him to take advantage of the New York rule that foreign divorces obtained without personal service are void.[81] So, a recital in a foreign decree that it was obtained by publication raises a presumption that it was so obtained and that the law of the foreign State justified such a judgment.[82]

§ 1973. Estoppel to Claim That Divorce Illegal.

One who has participated in or acted upon a foreign decree will be thereby estopped to claim that it is valid, and clearly one who obtained the divorce cannot impeach the decree on the ground of lack of jurisdiction of the court.[83] Therefore, one who goes to another State and there obtains a divorce by publication is estopped to claim that such divorce is invalid, and that she is therefore entitled to rights in the estate of the husband.[84]

Even a libellee who appeared in the foreign proceedings cannot object to the jurisdiction of the court where he did not make the objection of fraud before that court,[85] and a wife who colludes

80. Paul v. Paul (S. D.), 170 N. W. 658.

81. Percival v. Percival, 186 N. Y. 587, 79 N. E. 1114.

In New York, however, it has been held that the burden is on one relying on a foreign divorce to prove all necessary facts to show its validity. Lie v. Lie, 159 N. Y. S. 748, 96 Misc. 3.

82. Howard v. Strode (Mo.), 146 S. W. 792. See *In re* Higgins, 124 N. Y. S. 1005, 68 Misc. 259.

83. Bledsoe v. Seaman, 77 Kan. 679, 95 P. 576; People v. Shrady, 95 N. Y. S. 991, 47 Misc. 333.

84. *In re* Swale's Estate, 172 N. Y. 651, 65 N. E. 1122, affg. 70 N. Y. S. 220, 60 App. Div. 599; Starbuck v. Starbuck, 173 N. Y. 503, 66 N. E. 193, 93 Am. St. R. 631; *In re* Sheedy's Estate, 175 N. Y. S. 891; Gibson v. Gibson, 143 N. Y. S. 37, 81 Misc. 508.

85. Malcolm v. Malcolm, 100 Ky. 310, 38 S. W. 141, 19 Ky. Law Rep. 563; *In re* Bruyn's Estate (Sur.), 41

with her husband in his suit for divorce by going to a jurisdiction where neither of them are domiciled and appearing in his divorce libel and permitting him to obtain a decree, being paid for this action, and who then starts two proceedings attacking the divorce which she is paid for dropping, and who then herself marries again, is estopped from attacking the divorce on the death of the husband and from claiming that she is his lawful widow.[86]

Furthermore, one who remarries on hearing that the spouse had obtained a divorce is estopped to claim that the divorce was illegal and to claim marital rights in the estate of the divorced spouse.[87]

Also, one who aided the wife to obtain a divorce in a foreign State, and subsequently married her, will be estopped to claim that the foreign divorce was void, and he cannot invoke the public policy of the State not to recognize foreign divorces obtained without service.[88]

§ 1974. Incorrect Name of Defendant.

A foreign divorce decree may be recognized although the libellee is not correctly named where she is named by the names she usually went by and was known by.[89]

§ 1975. Effect if Foreign Decree on Interest in Land in State.

A foreign divorce without service or notice to the wife will not affect her rights to real estate within the State.[90]

§ 1976. Effect of Foreign Decree Entered Nunc Pro Tunc.

Where a judgment is not entered properly through error the

N. Y. S. 414, 75 N. Y. St. R. 816, 17 Misc. 481.

86 Chapman v. Chapman, 224 Mass. 427, 113 N. E. 359, L. R. A. 1916F, 528.

87. Bruguiere v. Bruguiere, 172 Cal. 199, 155 P. 988.

88. Kaufman v. Kaufman, 163 N. Y. S. 566, 177 App. Div. 162, 160 N. Y. S. 19.

89. Douglas v. Teller, 53 Wash. 695, 102 P. 761.

90. Gooch v. Gooch, 38 Okla. 300, 133 P. 242; *In re* Grossman's Estate, 67 Pa Super. Ct. 367. See *ante*, §§ 1761, 1863, 1874.

court may later order judgment to be entered *nunc pro tunc* to validate a marriage made in reliance on it.[91]

§ 1977. Void Divorce No Defence to Action for Criminal Conversation.

A divorce granted to one in a foreign State without personal service or appearance is not a defence to an action for criminal conversation against one who married the person obtaining such divorce subsequent to the divorce.[92]

§ 1978 Effect of Void Divorce on Remarriage of Innocent Spouse.

Where the husband leaves the wife in New York and goes to California, where he obtains a divorce on service by publication, this divorce is void in New York, and therefore if the wife marries again in New York, and then removes to Illinois, where she lives with the new husband as man and wife for ten years, this is a void marriage, and the husband cannot be convicted of bigamy if he leaves this woman and marries another. It was claimed in this case that the cohabitation in Illinois constituted a common-law marriage, but the court holds that there is nothing in the record which indicates that the parties contemplated or desired a common-law marriage, or that they entered into such a contract. Their cohabitation was pursuant to the ceremony of marriage performed in New York. and neither of them doubted the validity of that marriage until after their separation, and therefore there was no common-law marriage.[93]

§ 1979. Rule When Equity Demands Foreign Divorce Be Recognized.

The New York Court of Appeals has very lately introduced an important qualification in its rigid rule against the recognition of

91. Mock v. Chaney, 36 Colo. 60, 87 P. 538.

92. Berney v. Adriance, 142 N. Y. S. 748, 157 App. Div. 628.

93. People v. Shaw, 259 Ill. 544, 102 N. E. 1031, L. R. A. 1915E, 87.

foreign divorces made without service. The court remarks that the rule is based on public policy and morality, and not on any legislation, and will not be enforced when its reason is lacking, even in a case technically within its purview. So where a man sued to annul his marriage on the ground that the prior divorce of his wife was void, as obtained without personal service, and it appeared that the wife had formerly lived with her husband in another State, and that he had deserted her and come to New York to live, and she had obtained a divorce in the other State for desertion and married the present plaintiff, and her first husband had died, common decency and justice requires that the present action be dismissed. The wife was innocent throughout, and the death of the first husband leaves no other party to be affected. In short, the rule should be used to prevent fraud and not to aid it.[94]

§ 1980. Effect of Reconciliation.

A foreign divorce may not be recognized where it appears that the parties have become reconciled and subsequently separated.[95]

94. Hubbard v. Hubbard (N. Y. 1920). See *ante*, § 1969.

95. Hill v. Hill, 62 Pa. Super. Ct. 439.

CHAPTER XLVI.

FRAUDULENT FOREIGN DIVORCE.

SECTION 1981. Foreign Decree Impeached on Ground of Fraudulent Evidence.
1982. Foreign Decree Impeached for Fraud in Jurisdiction.
1983. Moving to Another State to Obtain Divorce.
1984. Fraudulent Concealment of Pendency of Another Action.
1985. Foreign Decree for Custody of Children.

§ 1981. Foreign Decree Impeached on Ground of Fraululent Evidence.

A divorce procured by fraudulent evidence cannot be impeached collaterally by a party as this would open the way to endless litigation, and no judgment would be binding.[96] So a claim that a foreign divorce was obtained by misstatements of the age of the libellant cannot be used to impeach the divorce decree.[97] But a stranger can impeach any decree for fraud, as this is his only opportunity to present his rights.[98]

§ 1982. Foreign Decree Impeached for Fraud in Jurisliction.

The full faith and credit clause of the Federal Constitution does not prevent the record of divorce of a sister State from being impeached for fraud in jurisdiction.[99]

It is now settled that a State court has a right, without violating the full faith and credit clause of the Federal Constitution, to impeach collaterally a decree of divorce made in another State by

96. Nicholson v. Nicholson, 113 Ind. 131, 15 N. E. 223; Deyette v. Deyette (Vt.), 104 A. 232 (cannot be impeached for false testimony).

97. Deyette v. Deyette (Vt.), 104 A. 232.

98. Ogle v. Baker, 137 Pa. St. 378, 20 A. 998.

99. Solomon v. Solomon, 140 Ga. 379, 78 S. E. 1079; Chapman v. Chapman, 224 Mass. 427, 113 N. E. 359; Burlen v. Shannon, 99 Mass. 200, 96 Am. Dec. 733; Dumont v. Dumont (N. J. Ch. 1900), 45 A. 107; Jung v. Jung, 96 A. 499; Hall v. Hall, 122 N. Y. S. 401, 67 Misc. 267, judgment reversed 123 N. Y. S. 1056, 139 App. Div. 120. See State v. Giroux (Mont.), 19 Mont. 149, 47 P. 798; Bidwell v. Bidwell, 139 N. C. 402, 111

proof that the court had no jurisdiction, even when the record purports to show jurisdiction and the appearance of the other party. So, although the other court has found that the libellant was there domiciled, still the court may consider *de novo* the question of domicile and decide that there was no domicile in the jurisdiction granting the decree, and that therefore that court had no jurisdiction.[1] And wherever the court is defrauded into thinking it has jurisdiction when there is none, the decree may be impeached collaterally.[2] If the fraud is outside of the evidence, as in preventing the party from presenting his case, the judgment may be impeached collaterally,[3] and it is a fraud on the court which will prevent its proceeding being sustained in another State that the plaintiff concealed the true residence of the defendant and obtained divorce without actual notice.[4]

§ 1983. Moving to Another State to Obtain Divorce.[5]

A State need not recognize a divorce granted to one of its citizens who moves to a foreign State and there obtains a divorce, where he moved for that purpose.[6] When the party, domiciled in one State or country, goes into another, as is often done for the sake of getting divorce on some ground not admissible within the jurisdiction,

Am. St. R. 797, 2 L. R. A. (N. S.) 324; Everett v. Everett, 180 N. Y. 452, 73 N. E. 231.

1. Andrews v. Andrews, 188 U. S. 14, 39, 176 Mass. 92, 93; Dormitzer v. German Savings & Loan Soc., 23 Wash. 132, 62 P. 862, affd. German Savings & Loan Soc. v. Dormitzer, 192 U. S. 125, 24 S. Ct. 221, 48 L. Ed. 373.

2. Dunham v. Dunham, 162 Ill. 589, 44 N. E. 841.

3. Daniels v. Benedict, 50 Fed. 347.

4. Field v. Field, 215 Ill. 496, 74 N. E. 443, affirming judgment 117 Ill. App. 307; Lister v. Lister, 86 N. J. Ch. 30, 97 A. 170; Davenport v. Davenport, 67 N. J. Eq. 320, 58 A. 535.

5. As to matrimonial domicile see further *ante*, §§ 1966, 1969.

6. Dickinson v. Dickinson, 167 Mass. 474, 45 N. E. 1091 (evidence showing going into another State to obtain divoree); Andrews v. Andrews, 176 Mass. 92, 57 N. E. 333, affd. 188 U. S. 14, 23 S. Ct. 237, 47 L. Ed. 366 (although wife appeared and objected to the plaintiff's residence and withdrew the objection on payment of money); McGown v. McGown, 43 N. Y. S. 745, 18 Misc. 708, 46 N. Y. S. 285, 19 App. Div. 368, judgment affirmed 164 N. Y. 558, 58

the risk is run of finding that divorce of no legal validity. No jurisdiction properly arises without *bona fide* domicile.[7] So the full faith and credit clause of the Federal Constitution is not violated by the refusal of a State court to recognize a decree of divorce by one who left the State temporarily for the purpose of obtaining a divorce in another State for a cause which was not a cause for divorce in the State where he was domiciled.[8]

But the mere fact that one went to another State with the predominant purpose of obtaining a divorce there will not invalidate it provided he went there with the intention of remaining.[9]

Hence, although a divorce decree procured in a foreign State, without personal service of process on the defendant therein, the latter having been made a party only by publication or other substituted process, under the foreign law, and the plaintiff in such proceeding having gone to the foreign jurisdiction solely for the purpose of instituting such litigation, may be successfully attacked by a bill for fraud in any other State wherein rights are claimed under such decree, yet such attack cannot be sustained when it appears that the party obtaining the decree removed to the foreign State with the *bona fide* purpose of making a home in that State, although entertaining at the same time a purpose to bring in the latter State an action for divorce as soon as a domicile therein could be acquired.

Jurisdiction of the person of the defendant may be acquired in the foreign State by publication, or other substituted service, although the defendant is, in fact, a non-resident. And this applies to either spouse, although the other has never been in the State where the suit is brought; and on such service a decree can be obtained which should be respected in another jurisdiction. The effect of such a decree, in a State that chooses to recognize it, is to free both spouses from the bonds of matrimony previously binding

N. E. 1089; State v. Duncan (S. C.), 96 S. E. 294.

7. Thompson v. State, 28 Ala. 12.

8. Andrews v. Andrews, 188 U. S. 14, 23 S. Ct. 237 47 L. Ed. 366, affg. 176 Mass. 92, 57 N. E. 333.

9. Carling v. Carling, 78 N. J. Eq. 42, 81 A. 565.

them. But it is optional with each State to accord recognition, or to refuse it, since a refusal has been held, by the highest authority, not to violate the full faith and credit clause of the Federal Constitution. That is, the courts of the several States may still recognize such foreign decrees on the ground of comity. The fact that the State in which recognition is sought provides by its own laws for the rendering of such decrees in favor of a resident against a non-resident on publication indicates the duty of according validity on the ground of comity to similar action in other States, where there is no material evidence of unfairness, and the proceedings are not open to an attack of fraud. Such a decree will be upheld in the State of the domicile of the libellee where it appears that he had actual notice of the proceedings and that he employed counsel to watch the course of the action, although they entered no appearance and at his direction made no defence.

It follows that an order for the custody of the children made in such a proceeding is *res judicata* as to both spouses, and will not be changed in the jurisdiction where the libellee lives, although the libellant afterward goes there to live.[10]

§ 1984. Fraudulent Concealment of Pendency of Another Action.

The concealment of the pendency of another action for divorce between the parties is a fraud on the court, which renders its decree open to attack in another State.[11]

§ 1985. Foreign Decree for Custody of Children.

A foreign divorce decree settling the care and custody of the children rendered by a foreign court having jurisdiction is entitled to full faith and credit,[12] and so an order modifying an order as

10. Kenner v. Kenner, 139 Tenn 211, 201 S. W 779, L. R. A. 1918E, 587.

11. Dunham v. Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70, 57 Ill App. 475

12. *Ex parte* Wenman, 33 Cal App. 592, 165 P. 1024; Hardin v. Hardin, 168 Ind. 352, 81 N. E. 60; *Ex parte* Boyd (Tex. Civ. App.), 157 S. W. 254 (only so long as circumstances remain unchanged); Anderson v. Anderson, 74 W Va. 124, 81 S. E. 706.

to custody is also entitled to full faith and credit,[13] but not where the foreign judgment was based on fraud;[14] and it is even held that a court has no right to base its order as to custody merely on the decree of a foreign court as to custody.[15]

A foreign decree of divorce awarding custody of a child is not void merely because the child resided at the time in another State.[16]

But although the foreign decree is conclusive as to conditions existing at the time, it is not conclusive for all time, and the relation of parent and child being a status like marriage, regulated by the State in which the parties are domiciled, the orders of one State awarding custody of a child in divorce is not an estoppel of all future inquiry in courts of another State wherein the child has acquired a domicile,[17] but the court may make such order as the best interests of the child may require.[18] Notice of the inception of such proceedings is jurisdictional and must be served within the State unless the parent appears.[19]

13. Morrill v. Morrill, 83 Conn. 479, 77 A. 1. See Pinney v. Sulzen, 91 Kan. 407, 137 P. 987 (not conclusive).

14. Matthews v. Matthews, 139 Ga. 123, 76 S. E. 855; Milner v. Gatlin, 143 Ga. 816, 85 S. E. 1045.

15. Judson v. Judson, 171 Mich. 185, 137 N. W. 103; Rowe v. Rowe, 76 Ore. 491, 149 P. 533.

16. Schroeder v. Schroeder, 86 S. E. 224.

17. Seeley v. Seeley, 30 App. D. C. 191; Milner v. Gatlin, 139 Ga. 109, 76 S. E. 860; People v. Hickey, 86 Ill. App. 20; Gould v. Gibson, 180 Mo. App. 477, 166 S. W. 648; *Ex parte* Clarke, 82 Neb. 625, 118 N. W. 472; Clarke v. Lyon, *Id.*; *Ex parte* Alderman, 157 N. C. 507, 73 S. E. 126; Mylius v. Cargill, 19 N. M. 278, 142 P. 918 (new conditions may be inquired into); *Ex parte* Stewart, 137 N. Y. S. 202, 77 Misc. 524; Wilson v. Elliott, 96 Tex. 472, 73 S. W. 946, 97 Am. St. R. 928; Linch v. Harden (Wyo.), 176 P. 156. See people v. Multer, 175 N. Y. S. 526.

18. Davies v. Fisher (Cal. App.), 166 P. 833 (court where parties now live may order allowance to mother for support of child although foreign decree made no such provision); *In re* Bort, 25 Kan. 308, 37 Am. R. 255.

19. White v. White, 65 N. J. Eq. 741, 55 A. 739.

FORMS

(It being manifestly impossible to supply forms adapted to the practice of every State, the Editor has attempted here to suggest New York forms which may be adapted for use in the Code States and Massachusetts forms which may be adapted for use in States having simplified common-law pleading. It is hoped that the bar in other States may use the language of these forms where applicable, but should in each State mould it to local practice.)

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FORMS

I. MARRIAGE.

No. 1.

Civil Contract of Marriage.

This agreement, made this ..... day of ....., 19.., by and between A. B., residing at ....., county of ....., State of New York, and C. D., residing at ....., county of ....., State of New York;

Witnesseth, That the said parties have this day mutually and each for him and herself willingly agreed to become lawfully united in marriage, in accordance with the provisions of subdivision 4 of section 11 of the Domestic Relations Law, and that on and after the date hereof, each for him and herself, undertakes to assume all the obligations attendant upon the relationship of husband and wife, and to be controlled in all respects by law, in the same manner and to the same extent as if the marriage of such parties had been officially solemnized by a clergyman, minister, priest or magistrate.

That this contract of marriage has been executed on the above-named day at ..... [*state place where contract is executed*], in the city [*or village*] of ....., county of ....., State of .....

That the witnesses to such marriage are E. F., residing at ....., county of ....., State of ....., and G. H., residing at ....., county of ....., State of .....

(Signed) A. B.
C. D.

Witnesses:
E. F.
G. H.

STATE OF NEW YORK,
COUNTY OF....., } *ss.:*

On this ..... day of ....., 19.., before me personally appeared A. B and C. D., and E. F. and G. H., to me personally known, and known to be the persons described in and who executed the foregoing instrument, and they duly severally acknowledged that they executed the same, for the uses and purposes therein mentioned.

L. M.,
[*Official Title of Judge of a Court of Record.*]

No. 2.

Affidavit for License to Marry.

STATE OF NEW YORK,
COUNTY OF .....,
..... OF .....

No. .....

.....
groom

and .....
bride

applicants for a license for marriage, being severally sworn, depose and say, that to the best of their knowledge and belief the following statement respectively signed by them is true, and that no legal impediment exists as to the right of the applicants to enter into the marriage state.

FROM THE GROOM:

Full name .....
.....
Color .....
Place of residence .....
(street address)
.....
(city, town or village) (state)
Age .....
Occupation .....
Place of birth.....
Name of father.....
.....
Country of birth.....
Maiden name of mother.....
.....
Country of birth.....
Number of marriage.....
I have not to my knowledge been infected with any venereal disease, or if I have been so infected within five years I have had a laboratory test within that period which shows that I am now free from infection from any such disease.
Former wife or wives
living or dead.....

FROM THE BRIDE:

Full name .....
.....
Color .....
Place of residence .....
(street address)
.....
(city, town or village) (state)
Age .....
Occupation .....
Place of birth.....
Name of father.....
.....
Country of birth.....
Maiden name of mother.....
.....
Country of birth.....
Number of marriage.....
I have not to my knowledge been infected with any venereal disease, or if I have been so infected within five years I have had a laboratory test within that period which shows that I am now free from infection from any such disease.
Former husband or husbands
living or dead.....

FROM THE GROOM:	FROM THE BRIDE:
Is applicant a divorced person.....	Is applicant a divorced person.....
If so, when and where divorce or divorces were granted.....	If so, when and where divorce or divorces were granted.....
.....	.....

....

groom bride

Subscriber and sworn to before me

this ..... day of 19

..... *Clerk*

☞ FUTURE ADDRESS

(Enter here EXACT FUTURE ADDRESS after marriage if known)

.....

(street address)

.....

(city, town or village) (state)

☞NOTICE TO TOWN OR CITY CLERK. Please have marriage license and certificate fastened SECURELY to affidavit for license and consent, before filing with county clerk.

No. 3.

Certificate of Consent.

This is to certify that ....., who have hereto subscribed ..... name, do hereby consent that.....

(*Name of Minor*)

who is ..... and who is under the age of ....

(*My or our Son, Daughter or Ward*)

years, shall be united in marriage to .....

by any minister of the gospel or other person authorized by law to solemnize marriages.

Witness my hand this ..... day of ..... A. D., 19..

.....

.....

(*Signatures of Parents or Guardian*)

No. 4.

Marriage License.

THIS IS A MARRIAGE LICENSE, AND NOT A MARRIAGE CERTIFICATE. The Marriage Certificate on the reverse side should be filled out and filed promptly by the Clergyman or Magistrate as required by law, with the

Town or City Clerk who issued the License. *See that your marriage is thus recorded.*

PLACE OF REGISTRY
STATE OF NEW YORK
County of.....
Town or City of.....

NEW YORK STATE DEPARTMENT OF HEALTH
Division of Vital Statistics

Registered No. .....

MARRIAGE LICENSE

Know all Men by this Certificate, that any person authorized by law to perform marriage ceremonies within the State of New York to whom this may come, he, not knowing any lawful impediment thereto, is hereby authorized and empowered to solemnize the rites of matrimony between ..... of ..... in the county of ..... and State of New York and ..... of ..... in the county of ..... and State of New York and to certify the same to be said parties or either of them under his hand and seal in his ministerial or official capacity and thereupon he is required to return his certificate in the form hereto annexed. The statements endorsed hereon or annexed hereto, by me subscribed, contain a full and true abstract of all the facts concerning such parties disclosed by their affidavits or verified statements presented to me upon the application for this license.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Town or City at ..... this ..... day of ..... nineteen hundred and .....

.....

SEAL .....

Clerk

The following is a full and true abstract of all the facts disclosed by the above-named applicants in their verified statements presented to me upon their applications for the above license:

FROM THE GROOM:	FROM THE BRIDE:
Full name	Full name .....
.....	.....
Color	Color .....
Place of residence	Place of residence .....
(street address)	(street address)
.....	.....
(city, town or village) (state)	(city, town or village) (state)
Age	Age .....
Occupation	Occupation .....
Place of birth.....	Place of birth.....

FROM THE GROOM:	FROM THE BRIDE:
Name of father.....	Name of father.....
.....	.....
Country of birth.....	Country of birth.....
Maiden name of mother.....	Maiden name of mother.....
.....	.....
Country of birth.....	Country of birth.....
Number of marriage.....	Number of marriage.....
I have not to my knowledge been infected with any venereal disease, or if I have been so infected within five years I have had a laboratory test within that period which shows that I am now free from infection from any such disease.	I have not to my knowledge been infected with any venereal disease, or if I have been so infected within five years I have had a laboratory test within that period which shows that I am now free from infection from any such disease.
Former wife or wives living or dead.....	Former husband or husbands living or dead.....
Is applicant a divorced person.....	Is applicant a divorced person.....
If so, when and where divorce or divorces were granted.....	If so, when and where divorce or divorces were granted.....
.....	.....

☞FUTURE ADDRESS (Enter here EXACT FUTURE ADDRESS after marriage if known)

.....

(street address) (city, town or village) (state)

No. 5.

Marriage Certificate.

The written consents of the Parents, Guardians or Persons under whose care and government the Minor or Minors may be has been filed in the Town or City Clerk's office in ..... as provided by Section 15, of Article 3 of the Domestic Relations Law.

MARRIAGE CERTIFICATE

TO CLERGYMEN AND MAGISTRATES

The license and certificate duly signed by the person who shall have solemnized the marriage therein authorized shall be returned by him to the office of the town or city clerk who issued the same on or before the tenth day of the month next succeeding the date of the solemnizing of the marriage therein authorized and any person or persons who shall wilfully neglect to make such return within the time above required shall be deemed guilty of a

misdemeanor and upon conviciton thereof shall be punished by a fine of not less than twenty-five dollars or more than fifty dollars for each and every offense.

I, ... a .....
city
residing at ..... in the town of..... in county of
(street address) village
..... and State of New York, do hereby certify that I did on this ..... day of ..... in the year A. D. 19.... at ..... in the county of ..... and State of New York, solemnize the rites of matrimony between..... of ..... in the county of ..... and State of New York, and..... of ..... in the county of ..... and State of New York in the presence of ..... and ..... as witness, and the license therefor is hereto annexed.

Witness my hand at ..... in the county of ..... this ..... day of ..... A. D. 19....

In presence of

....
(*Signature of Person Performing Ceremony*)

....
(*Signature of Witness*) (*Address of Person Performing Ceremony*)

II. ANTENUPTIAL AND POSTNUPTIAL AGREEMENTS.

No. 6.

Antenuptial Agreement; Providing for Separate Enjoyment of Property After Marriage, for Payment of Money to Woman in Case of Death of Man, and Security Therefor.

This agreement made and entered into this fourteenth day of February, A. D. 1900, by and between John Corbett and Bridget Daly, both of Malden, Commonwealth of Massachusetts, Witnesseth: That in consideration of the promise and agreement of the said John Corbett to marry the said Bridget Daley and of the said Bridget Daly to marry the said John Corbett, it is hereby mutually agreed that both the said parties shall retain their respective estates with such as may hereafter accrue to them, separate and apart from the other, subject to the payment of their respective debts, with power to each to manage and dispose of their estates as they shall see fit, and at their decease to have the same descend to their respective heirs at law or otherwise dispose of as they may respectively by last will and testa-

ment order and appoint. In case of the decease of the said John Corbett she, the said Bridget surviving him there shall, within six months from the time of his decease, be paid to the said Bridget the sum of one thousand dollars from his estate. In order to secure the payment of the said sum, she, the said Bridget, immediately upon the decease of the said John Corbett shall have the sole use and possession of the premises numbered 92 Blackburn street, in Malden, being the northerly portion with the buildings thereon of the premises conveyed to the said John Corbett by Elijah B. Pillsbury and Susan E. Pillsbury by deed, dated September thirteenth, 1869, and recorded at Middlesex Registry of Deeds, South District, libro 1095, folio 240, and extending along Blackburn street 30 and ½ feet from the northerly line described in said deed. If at the expiration of the six months the said sum of one thousand dollars has not been paid to the said Bridget, then she shall have the said estate in fee with power to dispose of the same. Upon the death of the said John Corbett, she, the said Bridget surviving, shall by deed release all interest in his estate excepting the said claim of one thousand dollars and the security of the payment thereof.

IN WITNESS WHEREOF we hereunto affix our hands and seals on the day and date first above written. John (X) Corbett. Bridget Daley. (Seal) Witness to both, Marcellus Conway. Commonwealth of Massachusetts. Middlesex, ss. February 14, 1900. Then personally appeared John Corbett and acknowledged the above to be his free act and deed before me, Marcellus Conway, Justice of the Peace.

No. 7.

Antenuptial Agreement; Settlement Made in Lieu of Dower, Etc.

WHEREAS a marriage is contemplated and is intended to be solemnized between William H. Hall, of Brookline, in the County of Norfolk and Commonwealth of Massachusetts, and Caroline Wright Ruggles, of Wellesley, in the County of Norfolk and said Commonwealth, both of full age, and it is the purpose of said William H. Hall to uake a definite provision for the support of the said Caroline Wright Ruggles in lieu of the rights which she may become entitled to in case said marriage takes place and she becomes his widow, and

WHEREAS, said Caroline Wright Ruggles agrees and wishes to accept said provision in place of and as a substitute for all the rights, claims and interests to which she may hereafter become entitled in or to all the property and estate of every kind, real and personal, of the said William H. Hall in the event that said marriage shall take place and she shall become his widow.

NOW, THEREFORE, it is agreed by and between the said parties mutually to bind themselves and their respective heirs, executors and administrators as follows:

The said William H. Hall, in consideration of the said contemplated mar-

riage and of the covenants of the said Caroline Wright Ruggles hereinafter contained, hereby covenants that the said Caroline Wright Ruggles shall have out of his property and estate at the time of his death, if she shall then be his widow, the sum of Two Hundred and Fifty Thousand ($250,000) dollars for her own property outright, with interest from the date of his death, as a debt against his estate, in full release, settlement and discharge of all the rights, claims and interests which she might then become entitled to if this contract had never been made, except as hereinafter stated.

The said Caroline Wright Ruggles, in consideration of the said contemplated marriage and of the foregoing covenant of the said William H. Hall, hereby covenants that she will accept the said sum of Two Hundred and Fifty Thousand ($250,000) dollars in full release, settlement and discharge of all the rights, claims and interests to which she may, under the laws of the Commonwealth of Massachusetts or of any other state or country, become entitled in or to the whole or any part of the property of the said William H. Hall both real and personal and of every nature and kind and wherever situated in the event that she shall become his widow, except as hereinafter stated.

And further, she covenants that if by virtue of the laws of any state or country she shall, by reason of being his widow, become entitled to any other, further, or larger rights, interest, share or claim in, to, or over the whole or any part of the Property of the said William H. Hall wherever situated, that then in that event she will well and truly and without waste hold all of her said legal rights, interest, share or claim so coming to her in excess of the said sum of Two Hundred and Fifty Thousand ($250,000) dollars heretofore accepted in full settlement, so that the said excess shall be held in trust for the benefit of those persons who would be entitled thereto in the event of the said William H. Hall dying without a widow, and that she will release, transfer and convey the whole and every part of said excess to the use of such persons as soon as she shall have received full payment and satisfaction for the said sum of Two Hundred and Fifty Thousand ($250,000) dollars herein secured to her.

And further, in consideration of the payment of said sum of money, the covenants herein contained, and except as may be hereinafter stated, she agrees to waive and bar, and does hereby waive and bar, all dower and homestead rights, and any other rights, privileges and interests, statutory or otherwise, in the real estate of the said William H. Hall under the laws of the Commonwealth of Massachusetts, or under the laws of any other state or country, any rights, privileges or interests, as an heir-at-law or as an heir under any statute of said Commonwealth of Massachusetts, and any and all similar and equivalent rights under the laws of said Commonwealth of Massachusetts or of any other state or country.

And by virtue of this contract she now specially agrees to waive and bar, and does hereby irrevocably waive and bar all dower and homestead and other rights, privileges or interests, statutory or otherwise, in any real estate

by the said William H. Hall in his lifetime conveyed, and she covenants and agrees that she will join in any such conveyance of any real estate now or hereafter owned by the said William H. Hall so as to release all rights and make a good title in the purchase; that a conveyance by him without her joining therein shall be sufficient to convey any of his said property free of and from any of her rights as aforesaid, and for further assurance she hereby appoints him, the said William H. Hall, to be her attorney irrevocably for her and in her name and stead to release all her rights in any property so by him in his lifetime conveyed.

But the said Caroline Wright Ruggles specifically reserves to herself the right to claim dower at law in any real estate not so by him in his lifetime conveyed. Any such claim of dower shall be on account of or instead of the sum of money secured by this agreement and not in addition thereto, and such claim of dower shall not avoid this contract, but the dower rights so claimed and assigned shall be held in trust hereunder as heretofore specified to be released upon the full payment of the money secured hereby, and in case the assets of the estate shall prove insufficient to pay the said money in full, then the dower shall be valued by actuaries' tables at four per cent and a sufficient amount of the dower at the appraised value to make up the deficiency shall be retained by the said Caroline Wright Ruggles to her own use, or the said Caroline Wright Ruggles may at her election retain at such appraised value any part or the whole of said dower on account of the money hereby secured.

It is further agreed that the said Caroline Wright Ruggles may receive any sum awarded by any court as an allowance to a widow, but any such sum shall not increase the maximum amount secured hereby, but any such sum so received shall be in part payment thereof.

Provided, however, and it is expressly understood and agreed that nothing herein contained shall prevent the said Caroline Wright Ruggles from accepting any property or estate or any interest therein which the said William H. Hall may legally give to her by his last will or may legally convey to her by deed or other lawful process in his lifetime, and said William H. Hall in no way limits or restricts his right and power to give said Caroline Wright Ruggles other and further property or rights by will or otherwise as he may see fit.

IN TESTIMONY WHEREOF the said parties have hereunto set their hands and seals in duplicate this sixth day of April, A. D. 1906.

(Signed) WILLIAM H. HALL. (Seal)
(Signed) CAROLINE WRIGHT RUGGLES. (Seal)

Signed, sealed and delivered in the presence of us.

Signed — ELLEN L. SMALL to both.
Signed — HENRY W. B. CONWAY to both.

Hill v. *Treasurer*, 227 Mass. 331.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS. Boston, April 6, 1906.

Then personally appeared the above-named William H. Hall and Caroline Wright Ruggles and severally acknowledged the foregoing instrument by them subscribed to be their free act and deed.

Before me,

(Signed) HENRY W. B. CONWAY,
Notary Public.

No. 8.

Modern English Marriage Settlement.

THIS INDENTURE made the eighteenth day of July, One thousand nine hundred and ten.

Marshall B. Jones of 39. Mendola Court Madison, Wisconsin in the United States of America, Professor of German of the first part Elizabeth T. Atkins of Devonshire House in the County Borough of Southampton Spinster of the second part Laura Jones of Brookline Commonwealth of Massachusetts in the United States of America Widow (Mother of the said Marshall B. Jones) of the third part Margaret G. Atkins of Devonshire House aforesaid Widow (Mother of the said Elizabeth T. Atkins) of the fourth part and Lennox H. Lawrence of 31 State Street in the City of Boston and Commonwealth aforesaid in the United States America Counsellor at law and Daniel C. Jones Atkins care of Messieurs Hall and Company 9 Whitehall Place, Lond S. W. a captain in the Army Service Corps (hereinafter called "the Trustees") of the fifth part. WHEREAS a marriage has been agreed on and is intended to be solemnized between the said Marshall B. Jones and the said Elizabeth T. Atkins. *AND* whereas upon the treaty for the said intended marriage it was agreed that such settlement should be made as is hereinafter expressed. *AND* whereas the said Marshall B. Jones is entitled to the Policies of Insurance on his life hereinafter mentioned and assigned. And upon the treaty for the said intended marriage it was agreed that the said Marshall B. Jones should settle the said Policies in manner hereinafter appearing. *FROM* this Indenture *witnesseth* that in consideration of the said intended marriage the said Marshall B. Jones as Settlor and with the consent of the said Elizabeth B. Atkins hereby assigns unto the Trustees and the survivor of them and their and his successor or successors heirs, representatives and assigns hereinafter called the "Trustees" in trust. *ALL* that Policy or Policies of Insurance effected in his name and on his own life for the sum of Ten Thousand Dollars one policy for Two Thousand Dollars with the Mutual Life Insurance Company of New York dated the twenty ninth day of January Anno Domini One thousand nine hundred and one and numbered 1109271 and one for Five thousand dollars with the Central Life Assurance Society

of Des Moines Iowa dated the Eighth day of January One thousand nine hundred and ten and numbered 23230 and one Policy for Six hundred pounds with the Legal and General Life Assurance Company dated the Twenty Eighth day of June One thousand nine hundred and ten and numbered 43355 together with the said sum of Ten thousand Dollars and all other money to become payable thereunder by way of bonus or otherwise or any amount of money produced by the sale or surrender of the Policy or Policies. *TO HOLD* unto the Trustees In Trust for the said Marshall B. Jones until the said intended marriage And after the said intended marriage Upon trust that the Trustees shall upon the death of the said Marshall B. Jones get in and receive the money to become payable under the said Policy or Policies or prior to the death of said Marshall B. Jones sell or surrender the said Policy or Policies if in their absolute and uncontrolled discretion they deem it for the best interests of the family that it be so sold or surrendered and with the consent in writing of the said Marshall B. Jones and Elizabeth T. Atkins or the survivor or if both shall be then dead at the discretion of the Trustees invest the net money after payment of the costs and expenses of recovering the same with power from time to time with such consent or at such discretion as aforesaid to vary the investments. *AND* the said Marshall B. Jones hereby covenants with the Trustees that if the said intended marriage shall be solemnized the said Marshall B. Jones will not any time do any act or commit any default whereby the said Policies of Insurance may be rendered void or voidable and will in case either of the said Policies or any new Policy to be effected as hereinafter mentioned shall by any means become void forthwith at his own cost effect a new Policy in his life in lieu of such void Policy in the names of the Trustees in the amount equal to the sum which would have been payable under the void Policy if it had not become void and will duly and regularly pay the premium and other sums of money (if any which shall from time to time become payable for keeping on foot the Policies hereby assigned and every or any such new Policy as aforesaid and will on demand deliver to the Trustees the receipt for every such premium And it is hereby agreed that it shall be lawful for the said trustees if in their uncontrolled discretion they shall think fit to apply any part of the income or capital of the said husband's trust fund in or towards payment of the annual premiums and other sums if any necessary for keeping on foot or restoring the said Policies of Insurance or any such substituted Policy as aforesaid or for effecting any such substituted Policy. *PROVIDED* always that it shall not be obligatory on the Trustees to enforce the performance of any of the covenants hereinbefore contained in reference to the said Policies or any such substituted Policy unless when required so to do by writing signed or by some person or the guardian of some person beneficially interested in the Policies and unless due provision be made to the satisfaction of the Trustees for the payment of the costs of any proceedings required to be taken nor shall it be considered a breach of trust for the Trustees to permit the said covenant to remain unperformed or to permit

any such Policy as aforesaid to become void through any means whatever unless when so required and upon proper provision being made as aforesaid. *AND* the said Laura Jones hereby covenants with the Trustees that the Executors or administrators of the said Laura Jones will within one year after her death pay to the Trustees a share of her estate (except jewels, trinkets, ornaments of the person, plate linen, china, furniture, books and articles of the like nature) equal to that taken by each of her two daughters or their issue by right of representation or the survivor of them or by the issue of a deceased daughter by right of representation or in the event of both of her said daughters having died without having issue living at the date of the death of the said Laura Jones her heirs, executors or administrators will within one year thereafter pay to the Trustees the whole of her estate. *AND* the said Margaret G. Atkins hereby covenants with the Trustees to transfer to them within six calendar months after the solemnization of the said intended marriage Government of India Promissory Notes for Nine thousand five hundred rupees (three and a half per cent loans). *AND* it is hereby agreed and declared that all real and personal property to which the said Elizabeth T. Atkins shall become entitled upon the death of the said Margaret G. Atkins (except jewels, trinkets, ornaments of the person, plate linen, china, furniture, books and articles of the like nature) shall so soon as circumstances will admit and at the cost of the trust estate be conveyed transferred or paid to the Trustees both the property conveyed by the said Laura Jones and by the said Margaret G. Atkins to be Upon Trust that the Trustees shall sell call in and convert into money such part or parts of the said property as shall not consist of money or of authorized investments with power to postpone such sale calling in or conversion for such a period as they may think proper and so that no reversionary interest shall be sold until it falls into possession unless there is special reason for the sale and shall stand possessed of such part of the said property as shall consist of authorized investments or of money uninvested and of the money to arise from such sale calling in and conversion as aforesaid and of the net rents and income of the said property until the sale and conversion thereof upon the trusts and subject to the powers and provisions hereinafter declared concerning the Wife's trust fund and the income thereof respectively. *PROVIDED* also that the Trustees shall not be answerable in respect of any real or personal property becoming subject to the aforesaid declaration unless and until the same shall have been conveyed or paid to them nor be made liable in any way for not taking proceedings to get in such real or personal property or any part thereof unless and until required in writing so to do by some person or the guardian of some person beneficially interested and unless also provision be made to the satisfaction of the Trustees for the payment of the costs of any proceedings required to be taken. *PROVIDED* ALWAYS AND IT IS HEREBY AGREED AND DECLARED that the receipt of the said Trustees or of the survivor of them or of the executors or administrators of such survivor for the purchase monies of any property

hereby directed or authorized to be sold or for any other monies paid and for any stock funds shares or securities transferred to them or him by virtue of these presents or in the execution of any of the trusts or powers hereof shall effectually discharge the person or persons paying or transferring the same therefrom and from being bound to see to the application or being answerable for the loss or misapplication thereof. *AND* IT IS HEREBY AGREED AND DECLARED that the trustees shall upon receipt of the money to become payable under the hereinbefore recited Policies of Insurance the hereinbefore mentioned Government of India Promissory Notes for Nine thousand five hundred rupees and the monies to become payable upon the deaths of the said Laura Jones and Margaret G. Atkins as aforesaid respectively with the consent of the said Marshall B. Jones and Elizabeth T. Atkins during their joint lives and the survivor of them during his or her life and after the death of such survivor at the discretion of the Trustees invest the same and may with such consent or at such discretion as aforesaid vary the investments thereof. The monies to become payable under the hereinbefore recited Policies of Insurance and upon the death of the said Laura Jones and the investments for the time being representing the same as hereinafter referred to as "the husband's trust fund" and the Government of India Promissory Notes for Nine thousand five hundred rupees and the money to become payable on the death of the said Margaret G. Atkins and the investments for the time being representing the same are hereinafter referred to as "the Wife's trust fund." *AND* IT IS HEREBY AGREED AND DECLARED that the Trustees shall pay the income of the husband's trust fund to the said Marshall B. Jones during his life and after his death to the said Elizabeth T. Atkins during her life if she survive him without power of anticipation during any coverture. *AND* IT IS HEREBY FURTHER AGREED AND DECLARED that the Trustees shall pay the income of the Wife's trust fund to the said Elizabeth T. Atkins during her life without power of anticipation and after her death to the said Marshall B. Jones during his life if he shall survive her. *AND* IT IS HEREBY FURTHER AGREED AND DECLARED that after the death of the survivor of the said Marshall B. Jones and Elizabeth T. Atkins the Trustees shall stand possessed of the husband's trust fund and the Wife's trust fund In trust for such child children or remoter issue of the said intended marriage at such age or time or ages or times (not being earlier as to any object of this Power than his or her age of twenty one years or in the case of any female day of marriage) in such shares if more than one upon such conditions and in such manner as the said Marshall B. Jones and Elizabeth T. Atkins shall by any Deed or Deeds revocable or irrevocable jointly appoint. AND in default of and subject to any such appointment then as the survivor of the said Marshall B. Jones and Elizabeth T. Atkins shall by any Deed or Deeds revocable or irrevocable or by Will or Codicil appoint and in default of and subject to any such appointment In trust for all the children of the said intended marriage who being Sons attain the age of twenty-one

years or being daughters attain that age or marry under that age in equal shares and if there shall be but one such child then the whole to be in trust for that one child. But so nevertheless that no child who or any of whose issue takes any part of the trust fund under any such appointment as aforesaid shall be entitled to any share of the unappointed part of the trust fund without bringing the share or shares appointed to him or her or to his or her issue into hotchpot and accounting for the same accordingly unless the persons or person making such appointment shall thereby direct the contrary. *AND* IT IS HEREBY AGREED AND DECLARED that if there shall be no issue of the said intended marriage who being a Son shall attain that age or marry under that age then the said Trustees shall after the death of the said Elizabeth T. Atkins and such default or failure of children as aforesaid which shall last happen stand possessed of the said husband's trust fund and the income thereof in trust for the said Marshall B. Jones absolutely but if the said Marshall B. Jones die before the said Elizabeth T. Atkins then subject and without prejudice to the trusts hereinbefore declared at the death of the said Elizabeth T. Atkins to such person or persons individuals or institutions as the said Marshall B. Jones may by Deed or Will appoint and in default of such appointment in trust for the person or persons who under the statutes for the distribution of effects of intestates would on the death of Marshall B. Jones have been entitled thereto had he died possessed thereof intestate and without having been married. *AND* IT IS HEREBY AGREED AND DECLARED that if there shall be no issue of the said intended marriage who being a son shall attain the age of twenty-one years or being a daughter shall attain that age or marry under that age then and after the death of the said husband and such default or failure of children as aforesaid which shall last happen the said Trustees shall stand possessed of the said Wife's trust fund and the income thereof in trust for the said Elizabeth T. Atkins absolutely and so that she shall not have power during her now intended coverture to dispose thereof in the way of anticipation but if the said Elizabeth T. Atkins shall die during her now intended coverture then subject and without prejudice to the trusts hereinbefore declared at the death of the said Marshall B. Jones in trust for her brother the said Daniel C. Jones Atkins or (if he shall have predeceased her) for his child or children in equal shares and in default of such child or children then in trust for the person or persons who under the statutes for the distribution of the effects of intestates would on the death of the said Elizabeth T. Atkins have been entitled thereto if she had died possessed thereof intestate and without leaving a husband or issue her surviving such persons if more than one to take as tenants in common in the shares in which the same would have been divisible between them under the same statutes. *AND* IT IS HEREBY AGREED AND DECLARED that the Trustees may at any time or times with the consent in writing of the said Marshall B. Jones and Elizabeth T. Atkins during their joint lives and the survivor of them during his or her life and after the death of such survivor at the discretion of the Trustees

raise any part or parts not exceeding together one moiety of the vested or presumptive share of any child or other issue of the said intended marriage under the trusts or powers aforesaid and may apply the same for his or her advancement or benefit as the Trustees shall think fit. *AND* IT IS FURTHER UNDERSTOOD AND *DIRECTED* that all payment to be made by the said Trustees shall neither be anticipated or assigned. If on account of any adverse judgment or decree of Court or on account of incolvency bankruptcy or assignment on the part of any beneficiary under this trust the share of income to which the beneficiary would be entitled under any provision hereof would go to any person or persons other than said beneficiary then the share of said income which would have been received by such beneficiary shall be forfeited by him or by her and shall be retained by said Trustees or their successors in trust during the continuance of said trust and they shall during said time expend for his or her support and that of his or her family such portion of said share of income as they or their successors shall in their discretion see fit. But this shall not in any way affect the distribution of the principal as provided for. *AND* IT IS HEREBY AGREED AND DECLARED that all money liable to be invested under these presents may be invested in any investment or security for the time being authorized by law as investments for trust money or in any of the bonds or other securities of the United States or in or upon stocks, shares, bonds or securities of any Corporation municipal commercial or otherwise in the United States regularly paying interest or dividends or in mortgages upon improved real estate situated in the states of Wisconsin or Massachusetts or on any real or leasehold securities in England or Wales or in or on any stocks funds or securities of any British Colony or Dependency or in or on the stocks shares or securities of any Public or Private Company carrying on business in the United Kingdom or in any British Colony or Dependency which has paid a Dividend on its Ordinary Stock or shares for three years prior to the date of investment or in or on the stock or securities of any Municipal Corporation local authority or Public Body in the United Kingdom authorized to create stock or to borrow money. *AND* IT IS HEREBY AGREED AND DECLARED that any Trustee being a solicitor or other person engaged in any profession or business may be so employed and shall be entitled to charge and be paid all proper professional and other charges for any business or act done by him in connection with the trust including any act which a trustee not being a Solicitor or other person engaged as aforesaid could have done personally. *AND* IT HEREBY AGREED AND DECLARED that the Statutory power of appointing new Trustees shall for the purposes of these presents be vested in the said Marshall B. Jones and Elizabeth T. Atkins during their joint lives and of the survivor of them during his or her life. And that the personal representatives or representative for the time being of a last surviving or continuing Trustee may act as the Trustees or Trustee of these presents until the appointment of a new

Trustees or Trustee. whereof the said parties to these presents have hereunto set their hands and seals the day and year first before written.

MARSHALL B. JONES.
ELIZABETH T. ATKINS.
LAURA JONES.
MARGARET G. ATKINS.
LENNOX H. LAWRENCE.
DANIEL C. JONES ATKINS.
Army Service Corps.

Signed, Sealed and Delivered by the said Marshall B. Jones and Laura Jones in the presence of

LAURA B. JONES.

Signed, Sealed and Delivered by the said Lennox H. Lawrence in the presence of

GEORGE H. PHILLIPS.

Signed, Sealed and Delivered by the said Eilzabeth T. Atkins and Margaret G. Atkins in the presence of

A. W. BROOKS.

Signed, Sealed and Delivered by the said Daniel C. Jones Atkins in the presence of

ANNA HORNE.

No. 9.

Separation Agreement.

Agreement made and entered into this 12th day of December, 1903, between A. B., party of the first part, and C. B., party of the second part, both of the County and State of New York.

WHEREAS, the party of the second part now is and has been for several years past living apart and separate from the party of the first part, who is her husband, and,

WHEREAS, differences have arisen between the parties, by which they hereby agree to and do mutually separate and live apart, and in consideration of the payments to be made, as hereinafter stated, by the party of the first part to the party of the second part, each of the said parties agree that neither of them or either of them will interfere with the rights, privileges, doings or actions of each other and will not interfere in any way, manner or shape with each other, and each of the parties is at liberty to act and do as they see fit.

The party of the first part agrees to pay to the party of the second part the sum of Five Dollars each and every week, which payment is for the

support and maintenance of the party of the second part, payments to be made on Friday and Saturday of each week, the money to be sent to the address of the party of the second part by Post Office money order.

The party of the first part also agrees to pay in addition to the Five Dollars weekly the sum of Two Dollars per week on account of the balance due the party of the second part, pursuant to an agreement heretofore made between the parties.

In the event of the party of the second part in any way interfering with the party of the first part, such violation of this agreement shall have the effect of avoiding the obligations assumed by the party of the first part.

In the event of the party of the first part being sick and unable to work so that he will not earn money to make his payments as herein agreed upon, then the party of the first part shall send to the party of the second part a doctor's certificate of such sickness, in which case the payments shall be delayed until the recovery of the party of the first part and payments must be made up for such delay.

In Witness Whereof, the parties have hereunto set their hands and seals the day and year first above written.

L. S.

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L. S.

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(Acknowledgments)

Taken from *Winter* v. *Winter*, 191 N. Y. 462.

No. 10.

Separation Agreement; Trustee Named.

THIS INDENTURE made this 17th day of July, A. D. 1915, by and between George M. Preston, husband of Genevieve Preston of Boston, County of Suffolk, Commonwealth of Massachusetts, party of the first part, hereinafter called the husband; Willard P. Latham, of Everett, in the County of Middlesex, in said Commonwealth, hereinafter called the trustee, party of the second part; and Genevieve Preston, of said Boston, party of the third part, hereinafter called the wife.

WHEREAS there exists strained relations between the husband and the wife, resulting in present domestic friction and unhappiness; and

WHEREAS by reason thereof they are now living separate and apart from each other; and

WHEREAS the said wife is desirious of receiving support from the said husband and the said husband is desirious of providing support of the said wife, and

WHEREAS the party of the second part has agreed to act as trustee for the

arrangement by this instrument, and also to enter into covenants, agreements and obligations herein contained.

NOW, THEREFORE, this agreement witnesseth that

First: The husband promises and agrees with the trustee that the wife may live separately and apart from him and be as free from his marital control and authority as though a divoree had been obtained between the parties; that she may reside where she pleases without interference or espionage by him; that he will not molest, interfere with, or seek to control in any way or in any way interest himself in her life, place of dwelling, or mode of living.

Second: The wife covenants and agrees with said trustee in consideration of the covenants herein entered into on the part of the said husband that she will not in any way molest, interfere with, seek to discover, or control, or interest herself in any way or manner in the life, dwelling, home, residence of or manner of living, and that he will be as free from her without interference or espionage as though a divorce had been obtained between the parties and in case the wife violates this covenant and returns to her husband's dwelling, or said husband and wife resume living together, and renew their marital relations, then payments provided for herein shall cease and terminate.

Third: Both husband and wife each severally covenant and agree with said trustee that neither will traduce, malign, libel or slander the other in any way or manner or seek to injure the reputation of the other in the estimation of any person.

Fourth: In consideration of the covenants entered into on the part of the wife and on the part of the trustee, the husband agrees to pay to the trustee the sum of fifty (50) dollars upon the execution of this instrument and the sum of fifty-five (55) dollars every month, the first monthly payment to be made on August 17, 1915, and on the 17th day of each and every month thereafter during the continuance of this agreement, Said payments shall be received by the trustee as a separate estate of the wife, and he shall pay over to her said sums when received, for her own separate use free from the interference and control of any creditors and the same shall not be subject to anticipation, alienation nor subject to attachment or trustee process. Said trustee may, in his discretion, appoint the said wife as his agent to receive and receipt for said payments, and may revoke said appointment at pleasure upon proper and reasonable notice.

Fifth: The said husband hereby further covenants and agrees to surrender or release any and all claims to all furniture or household effects now in the possession of the said wife except a piano, and the wife hereby releases all right, title, and interest thereto, to the said husband in consideration of the premises, and hereby agrees to surrender and deliver the same upon demand to the said husband.

Sixth: The said payments per month shall continue during such time as said husband and wife are living separately and apart from each other, provided that said wife shall well and truly keep and perform her covenants and agreements herein contained, and in case said wife shall fail so to keep and

perform her said covenants and agreements then the liability of said husband to make the aforesaid payments to the said trustee hereunder shall cease without notice to the said wife or trustee. The said wife shall not contract any debts for necessaries or otherwise for which the said husband shall be charged nor in any way pledge the said husband's credit. The said wife shall not institute any action or civil process or criminal action whatever against the said husband on the ground of non-support or for necessaries.

Seventh: The said husband and wife agree that the said trustee shall not be personally liable for any default on the part of either the husband or wife and agree to indemnify and hold him harmless from any personal liability for or on account of any default on the part of either said husband or wife in performance of this agreement.

Eighth: Whenever in this instrument the parties of the first three parts are referred to, it shall be understood that the words heirs, executors, administrators, and assigns, are to be read in where the same are appropriate. Should the trustee herein named die, resign, or be for any reason unwilling or unable to execute these trusts, then if the husband and wife or other representative are unable to agree upon his successor, then either party may apply to the Probate Court for the County of Suffolk in said Commonwealth for the appointment of a successor, and upon such agreement or appointment said successor shall be vested with all powers and duties herein imposed upon the trustee.

Ninth. All the foregoing covenants which the husband and wife have made with the trustee are hereby expressly made each with the other in case said covenants and agreements can be enforced by any court at law or in equity or may have validity given to them hereafter by any Act of the Legislature.

Tenth: The trustee above named, or his successor, may take and begin any legal proceedings which shall be necessary and proper to maintain and enforce the rights and obligations of the husband or wife under this indenture upon application by the other for that purpose, being indemnified from any cost or expense by the party making such application and in case the trustee shall for any cause refuse or neglect to take or begin such proceedings, said husband and wife, and each of them, shall have the right to take and begin such proceedings in the name of the said trustee or his successor for the benefit and at the expense of the moving party.

WITNESS our hands and seals the day and year first above written to this and to two other instruments of like tenor.

Signed, sealed and delivered in the
presence of
GEORGE L. EATON.

GEORGE M. PRESTON. (Seal)
WILLARD P. LATHAM. (Seal)
GENEVIEVE PRESTON. (Seal)

(Taken from *Proctor v. Lombard*, 233 Mass. 213.)

No. 11.

Post-nuptial Agreement for Reconciliation and Maintenance; That Husband Refrain from Profanity or Drunkenness; Third Party as Mutual Friend.

INDENTURE made this twenty-sixth day of May, A. D., 1910, by and between Martin C. Patton, husband, party of the first part, Adeline T. Patton, his wife, party of the second part, and Andrew Terry, party of the third part, all of Boston in the County of Suffolk and Commonwealth of Massachusetts.

WHEREAS, certain unhappy differences have arisen between the said husband and wife by reason whereof they have separated and are now living separate and apart from each other; and

WHEREAS, it is the desire of the said husband and wife for the sake of their children to resume their home life, putting aside past differences and in an endeavor to bring up their children in a proper manner and they have agreed to again live together; and

WHEREAS, the said Andrew Terry has agreed to act as a third party for the purpose of the proper carrying out and enforcement of the arrangements intended to be hereby made;

Now, this INDENTURE WITNESSETH, that in pursuance of the said agreement and in consideration of the premises and of five dollars paid each to the said Terry and by the said Terry to each, the said Martin C. Patton doth hereby, so far as the agreements and the provisions hereinafter contained are to be performed and kept by him, covenant and agree with his said wife, Adeline T. Patton, and also separately with the said Andrew Terry; and in like manner the said wife, Adeline, doth hereby, so far as the agreements and provisions hereinafter contained are to be performed by her, covenant and agree with the said husband, Martin, and also separately with the said Terry; and the said Andrew Terry doth covenant and agree with the said Martin C. Patton and the said Adeline T. Patton and with the each of them separately as follows:

1. The said husband and wife are to immediately resume their marital relations, living together amiably and for the best interests of each and of the said children.

2. The said husband shall make every effort to and shall abstain from the use of intoxicating liquor; he shall also abstain from the use of profane, vulgar or improper language in his home and more especially in the presence of his children;

3. He shall pay to his wife, Adeline, regularly, once each week, the sum of at least nine dollars ($9);

4. And the said Martin C. Patton hereby retracts absolutely the statements which he made in the office of William J. Keith, attorney, attacking the character of his wife, Adeline T. Patton, the said statements having been made in the heat of his excitement, and the said Martin now acknowledges that they were erroneous and not founded on fact:

5. The said husband shall use every effort in his power to make the home life of his wife and children pleasant and agreeable;

6. The said Adeline T. Patton shall use every effort in her power to make the home life of her husband and children pleasant and agreeable; and shall forebear from reference to past differences between herself and her said husband; she shall so far as lies in her power assist her husband, Martin, in carrying out the agreements by him made and hereinbefore contained;

7. It is agreed and understood that the said Andrew Terry shall call at the home of the said Martin and Adeline once each week or as often as necessary and by his advice and suggestion endeavor to assist in the proper carrying out of the letter and spirit of this agreement.

IT IS FURTHER AGREED AND UNDERSTOOD that if the said Martin C. Patton does not keep and perform the stipulations herein contained, then his wife, the said Adeline, shall be free to leave his home taking with her her three children, and the said Martin hereby covenants and agrees with the said Adeline T. Patton and Andrew Terry that in that case he will be liable for her comfortable maintenance and support.

8. The said Andrew agrees that he will make the weekly calls as hereinbefore provided and will use his best endeavors to promote harmony between the parties concerned, but will not exercise undue influence over either of the parties hereto.

IN WITNESS WHEREOF the said parties have hereunto interchangeably set their hands and seals the day and year first above written.

In presence of

M. C. PATTON. (Seal)
ADELINE T. PATTON. (Seal)
ANDREW TERRY. (Seal)

Two words crossed out and five words interlined on page two before signing.

W. J. KEITH.

Suffolk, ss. May 26, 1910.

Then personally appeared the above named Martin C. Patton and acknowledged the foregoing instrument to be his free act and deed before me.

WILLIAM J. KEITH,
Justice of the Peace.

Suffolk, ss. May 26, 1910.

Then personally appeared the above named Adeline T. Patton and acknowledged the foregoing instrument to be her free act and deed before me.

WILLIAM J. KEITH,
Justice of the Peace.

III. ALIENATION OF AFFECTIONS, BREACH OF PROMISE, CRIMINAL CONVERSATION, AND SEDUCTION.

No. 12.

Declaration; Alienation of Affections.

COMMONWEALTH OF MASSACHUSETTS.

FRANKLIN, SS. SUPERIOR COURT.

Halbert E. Newell

vs.

Henry Foster.

PLAINTIFF'S DECLARATION.

First Count: And the plaintiff says that on or about the first day of September, A. D. 1914, he was living at Millers Falls in the Town of Montague in said County with Mabel L. Newell, his lawfully wedded wife, and that on or about said first day of September, A. D. 1914, the defendant, unlawfully contriving to injure the plaintiff, did entice and seduce the said Mabel L. Newell, the wife of the plaintiff, and by such enticement and seduction did win the affections of the said Mabel L. Newell and *alienate* her affections from him the said plaintiff, whereby, and by reason whereof, the plaintiff lost the affection, aid, assistance, comfort and corsortium of the said Mabel L. Newell, his wife, and the domestic felicity of himself and the said Mabel L. Newell was thereby broken up and destroyed, and he was otherwise greatly injured and damaged.

Second Count: And the plaintiff says that on or about the first day of September, A. D. 1914, Mabel L. Newell was his lawfully wedded wife, and that the defendant, at said Montague, on or about said first day of September, A. D. 1914, and at divers other times and places since said date, did have unlawful sexual intercourse with said Mabel L. Newell, the defendant's wife, whereby and by reason whereof the plaintiff has lost the affection, aid, assistance, comfort and consortium of his said wife, and has been otherwise greatly injured and damaged.

HALBERT E. NEWELL,
By HARRY E. WENTWORTH,
His Attorney.

COMMONWEALTH OF MASSACHUSETTS.

FRANKLIN, SS. SUPERIOR COURT. Nov. 3, 1915.

Halbert E. Newell

vs.

Henry Foster

DEFENDANT'S ANSWER.

Now comes the defendant in the above-entitled action and for answer denies each and every material allegation in each and every count in the plaintiff's writ and declaration therein contained.

HENRY FOSTER,
By WM. A. DANA,
His Attorney.

The defendant hereby demands trial by jury.

WM. A. DANA,
Attorney for Defendant.

No. 13.

Complaint; Alienation of Affections.

SUPREME COURT — ALBANY COUNTY.

A. B.,
Plaintiff,
against
C. B.,
Defendant.

The plaintiff complains of the defendant and alleges:

FIRST: That on the 30th day of December, 1914, at the City of Albany, N. Y., the plaintiff was married to D. B., each being at the time of said marriage a resident of the said City of Albany, N. Y., and that said D. B. is still the husband of plaintiff.

SECOND: That at the time of said marriage, said D. B. was twenty-one years of age and this plaintiff nineteen years of age.

THIRD: That the only issue of said marriage is a son, E. B., born September 19th, 1916.

FOURTH: That at all times since said marriage, the plaintiff and her

said husband, except as hereinafter set forth, have lived and cohabited together as man and wife peacefully, happily and harmoniously and manifested great love and affection each for the other.

FIFTH: That the defendant C. B. is the mother of said D. B. and since said marriage has at all times exercised and exerted influence and control over the mind and the acts of plaintiff's said husband.

SIXTH: That beginning on or about the first day of May, 1915, or shortly thereafter, the defendant manifested a dislike for the plaintiff and an extreme jealousy for the love and affection displayed for the plaintiff by her said husband and at all times thereafter wrongfully and maliciously sought to prejudice the mind of plaintiff's said husband against the plaintiff and to alienate his affection for her and to deprive her of his company, society, aid, protection and support and has ever since sought and endeavored by subtle contrivance, coaxing, threats of disinheritance and withdrawal of financial aid, loss of employment (the plaintiff's said husband being then employed under F. B., the husband of said defendant over whom the defendant at all times exercised complete dominion and control) and by misrepresentation of the plaintiff, to induce and entice plaintiff's said husband to separate himself from the plaintiff and to live separate and apart from her.

That in furtherance of the aforesaid wrongful purposes on the part of the defendant, the said defendant upon numerous occasions during the period aforesaid, the exact dates of which the plaintiff is unable specifically to state, the defendant urged this plaintiff to agree to a separation from plaintiff's said husband and sought particularly to impress upon plaintiff that she avoid bearing children as she would thereby become hopelessly tied to her said husband.

That also in furtherance of said wrongful purpose on the part of the defendant, the said defendant, as plaintiff is informed and verily believes, on or about the 16th day of July, 1915, or shortly prior thereto employed Messrs. A B. & C., practicing attorneys of this Court, then having offices at ..... Street, in the City of Albany, New York, to take such steps as might be necessary legally to bring about a separation between this plaintiff and her said husband and that in accordance therewith a proposed agreement of separation was prepared by said attorneys on or about the said 16th day of July, 1915, and on the 17th day of July, 1915, the said instrument in writing was presented to this plaintiff for signature without previous notice respecting the employment of said attorneys or of such proposed action; that the plaintiff's said husband then and there stated to plaintiff that the paper amounted to nothing, that he would not give her up nor would he remain apart from her except for a short time and that it was necessary to sign said paper because his parents insisted that it be done at once; that relying upon the said statement that it was necessary that said paper be signed and believing the same to be true, this plaintiff did on the said 17th day of July 1915, sign the paper or instrument so presented to

her as aforesaid, a copy of which said instrument is hereto attached marked "Exhibit A;" that soon thereafter plaintiff went to visit her aunt at New York, but returned to Albany on July 30, 1916, at the request of her said husband who met her upon her return and thereupon they resumed marital relations which continued until on or about the 25th day of August, 1916, when her said husband departed from Albany with a company of the National Guard, of which said Company he was a member, and that upon his return, through and solely by reason and as a result of the aforesaid continuing wrongful acts, influences and contrivances of the said defendant, the plaintiff's said husband abandoned and deserted her and her said child and took up his residence and home with the defendant and has ever since remained separate and apart from her.

SEVENTH: That by reason of the aforesaid wrongful and malicious acts, influence, misrepresentations, threats and contrivances of the defendant, the affections of plaintiff's said husband for her have been alienated and the plaintiff has been and will be wrongfully deprived by the said defendant of the aid, protection, comfort, society and support of her said husband, which she would otherwise have had and enjoyed, and whereby she has suffered damage in the sum of Ten Thousand ($10,000.00) Dollars.

WHEREFORE, plaintiff demands judgment for the sum of Ten Thousand ($10,000.00) Dollars together with the costs of this action.

R. B.,
Attorney for Plaintiff.
Office and P. O. Address, ... Street, Albany, N. Y.
(Verification)

No. 14.

Answer; Alienation of Affections.

SUPREME COURT — ALBANY COUNTY.

A. B.,
Plaintiff,
against
C. B.,
Defendant.

The defendant for her answer to the Plaintiff's complaint:

1. Admits the allegations contained in paragraphs numbered "First," "Second" and "Third."

2. Denies the allegations contained in paragraphs numbered "Fourth," "Sixth" and "Seventh," except that defendant admits that the separation agreement mentioned and described in paragraph "Sixth" in the complaint and attached to the complaint, and called "Exhibit A," was made and

executed by the plaintiff and D. B. on or about the 16th day of July, 1915.

3. Denies the allegations contained in paragraph "Fifth," except that defendant admits that she is the mother of said D. B.

4. And for a first, separate and distinct defense to the alleged cause of action set forth in the complaint, the defendant alleges that she is the mother of D. B. and that any advice which she may have given to her son, D. B., as to his domestic affairs, was given in good faith, without malice, and with a sincere desire to promote the welfare and happiness of the plaintiff and the said D. B., and that said advice is and was privileged.

5. And for a further, second, separate, distinct and partial defense to the alleged cause of action, set forth in the complaint, and in mitigation of any damages to which the plaintiff might otherwise be entitled, the defendant alleges that in good faith, and with a sincere desire to promote the welfare and happiness of the plaintiff and D. B., the defendant furnished the plaintiff and the said D. B., with food, lodging and funds; that she also introduced the plaintiff to her friends and acquaintances, and endeavored in every way to promote the comfort and happiness of the plaintiff, but that the plaintiff many times during her stay with the defendant, at defendant's home, exhibited a petty, jealous and mean disposition, and ungovernable temper and a habit of nagging, especially toward D. B., all of which the defendant overlooked and ignored, and that when the said D. B. complained to defendant in relation to the same, she, the defendant, always advised him to overlook the same and endeavor to live quietly and happily with the plaintiff.

6. And for a further, separate and distinct defense to the alleged cause of action set forth in the complaint, the defendant alleges that if the affections of D. B. have been alienated from plaintiff, or if said D. B. has been separated from the plaintiff, the same was caused solely and proximately by reason of the acts and conduct of the plaintiff and not by reason of any act or thing on the part of this defendant.

7. And for a further separate, distinct and partial defense to the alleged cause of action set forth in the complaint, and in mitigation of any damages to which the plaintiff might otherwise be entitled, the defendant alleges that D. B. is now employed by the State of New York and lives with and supports the plaintiff and the child of plaintiff and said D. B.

8. And for a further separate, distinct and partial defense to the alleged cause of action, set forth in the complaint, and in mitigation of any damages to which the plaintiff might otherwise be entitled, the defendant alleges, upon information and belief, that on or about the 16th day of July, 1915, the plaintiff and said D. B. duly made and entered into the separation agreement attached to the complaint hereto, and marked "Exhibit A."

WHEREFORE, defendant demands judgment that the complaint herein be dismissed with costs.

A. B. & C.,
Attorneys for Defendant.

Office and P. O. Address, ... Street, Albany, N. Y.

(Verification)

No. 15.

Complaint; Breach of Promise.

SUPREME COURT — ALBANY COUNTY.

A. B., an Infant, by D. E., her Guardian ad litem,
Plaintiff,
against
B. C.,
Defendant.

The infant plaintiff by D. E., her guardian ad litem, complains of the defendant and alleges:

FIRST

That the plaintiff, A. B., is a minor over the age of fourteen years, and is a resident of Albany County, New York. That D. E., the mother of said infant plaintiff, was by order of Hon. Charles C. Van Kirk, Justice of the Supreme Court, dated December 28th, 1908, and entered in the office of the Clerk of Albany County, N. Y., January 7th, 1909, duly appointed guardian ad litem of said infant plaintiff to prosecute this action.

SECOND

Upon information and belief, that in or about the month of January, 1908, the infant plaintiff and defendant, both being unmarried, in consideration that the infant plaintiff would marry the defendant, he, the said defendant, promised and agreed to marry the infant plaintiff, and said plaintiff and said defendant then became and were duly engaged to each other to be married, the said marriage to take place within a reasonable time.

THIRD

Upon information and belief, that the infant plaintiff confiding in the said promises of the defendant so made as aforesaid, entered into relations with the said defendant, which said relations continued for several weeks, by reason of which relations, said infant did subsequently and upon the 14th day of October, 1908, became delivered of a child of which this defendant is the father.

FOURTH

That the infant plaintiff confiding in said promises so made by defendant, has always remained and now is ready and willing to marry defendant and has frequently offered so to do, but the defendant has always refused and still

refuses to marry this infant plaintiff, in accordance with the said promises and agreement.

FIFTH

That at the time of infant plaintiff's and defendant's engagement as aforesaid, she, the said infant plaintiff, was engaged as a stenographer in the city of Albany, and had been for a long period of time prior thereto, and that on account of her engagement and of her condition brought about by the relations aforesaid, she was compelled to and did give up her position as such stenographer, and spent and devoted a great deal of time and money in and about the preparation for said marriage, and in and about her sickness and confinement, all of which defendant well knew, and said infant plaintiff became an object of scorn and ridicule to her relatives, friends and other acquaintances, and was, and is unable to procure further employment by reason of the birth of said child, and has suffered great damage to her health and reputation, in all amounting to the sum of Twenty Thousand Dollars ($20,000).

Wherefore, infant plaintiff demands judgment against the defendant for the sum of Twenty Thousand Dollars, besides the cost of this action.

H. & I.,
Attorneys for Infant Plaintiff.

Office and Postoffice Address, Albany, N. Y.

STATE OF NEW YORK, } ss.
COUNTY OF ALBANY, }

D. E. being duly sworn deposes and says, that she is the guardian ad litem of A. B., the infant plaintiff in this action; that she has heard read the foregoing complaint and knows the contents thereof; that the same is true of her own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters she believes it to be true.

D. E.

Sworn to before me this 8th day of January, 1909.

F. G.,
Notary Public.

No. 16.

Answer; Breach of Promise; Defence of Unchastity.

TITLE.

The defendant above named for answer to the complaint herein.

FIRST: For a first defense:

1. Denies any knowledge or information sufficient to form a belief as to whether any allegation set forth in the first paragraph or subdivision of the complaint is true.

2. Denies the second, third and fourth paragraphs or subdivisions of the complaint and each and every allegation therein contained except that in the month of January, 1908, and at all the times mentioned in the complaint, the plaintiff and defendant were each unmarried.

3. Denies the fifth paragraph or subdivision of the complaint and each and every allegation therein contained except that at all the times mentioned in the complaint the plaintiff was a stenographer engaged as such in the city of Albany.

SECOND: For a second and further defense, defendant alleges:

1. Upon information and belief, that prior to the times mentioned in the complaint and prior to the alleged promise of defendant to marry the plaintiff, the plaintiff was unchaste and had had sexual intercourse with divers men other than the defendant and had had sexual intercourse with them prior and subsequent to and during the month of January, 1908, and that plaintiff's alleged pregnacy, if any there was, was the result of such sexual intercourse and that the defendant subsequently learned that the plaintiff was unchaste and had had sexual intercourse prior and subsequent to January 1st, 1908, with divers men other than the defendant and that defendant thereby became absolved from the alleged promise to marry the plaintiff, if any there was.

J. K. & M.,
Attorneys for Defendant.

Office and P. O. Address, Albany, N. Y.

(Verification)

No. 17.

Answer; Breach of Promise; Partial Defence in Mitigation of Damages.

1. And for a further, separate and partial defense to the alleged cause of action set forth in the plaintiff's complaint, and in mitigation of any damages to which the plaintiff might otherwise be entitled, the defendant alleges, that after the making of the promises set forth in paragraph "1" of the plaintiff's complaint, the plaintiff conducted herself in an improper manner, to wit: that she became frequently intoxicated, etc. (continue with facts in mitigation).

No. 18.

Complaint; Criminal Conversation.

TITLE.

The plaintiff complains of the defendant and alleges:

I. That at all the times herein mentioned the plaintiff and C. B. were husband and wife, having been married on the ..... day of ....., 19.., living together at ....., N. Y.

II. That the defendant contriving and wrongfully, wickedly and unjustly intending to injure the plaintiff and to deprive him of the comfort, fellowship, society, aid and assistance of C. B., the wife of plaintiff, and to alienate and destroy her affection for the plaintiff, heretofore, to wit: on the ..... day of ....., 19.., at ....., N. Y., and on divers other days, times and places before the commencement of this action, and without the privity or connivance of plaintiff, wrongfully, wickedly and unjustly debauched and carnally knew the said C. B., she at the time being the wife of plaintiff, and known to defendant to be the wife of plaintiff.

III. That in consequence and by reason of said criminal relations the affection of the said C. B. for the plaintiff was then and there alienated and destroyed, and also by reason of the premises the plaintiff has lost and been deprived of the comfort, fellowship, society, aid and assistance of the said C B., his said wife, in his domestic affairs, which the plaintiff during all that time ought to have had and otherwise might and would have had, and that plaintiff has suffered thereby great distress of body and mind, all to the damage of the plaintiff Five thousand Dollars ($5,000.00).

WHEREFORE, plaintiff demands judgment against the defendant for the sum of Five thousand Dollars ($5,000.00), together with the costs of this action.

A. B. & C.,
Attorneys for Plaintiff.
Office & P. O. Address, ... Street, Albany, N. Y.
(Verification)

No. 19.

Complaint; Seduction.

TITLE.

The plaintiff complains of the defendant and alleges:

I. That A. B. is the infant daughter of plaintiff and at the time of the seduction of the said A. B. and the acts of the defendant hereinafter described the said A. B. was seventeen years of age; that prior to said time said A. B. was chaste and of good reputation.

II. That at all the times herein mentioned the said A. B. was the servant of plaintiff who was and still is entitled to her services, and that prior to said seduction and the acts of the defendant hereinafter described said A. B. rendered services to plaintiff in and about his household.

III. That on or about the ..... day of ....., 19.., and on divers other days and times between the ..... day of ....., 19..., and the ..... day of ....., 19..., the defendant, well knowing the premises, and contriving and wrongfully and unjustly intending to injure the plaintiff and to deprive him of the service and assistance of said A. B. and without plaintiff's consent or con-

nivance, and by means of artifice, deception, and cunning, wrongfully and unlawfully seduced the said A. B. and carnally knew her, whereby she then became pregnant and sick with child (*or became infected with* ....., *a loathsome venerial disease. See White* v. *Nellis*, 31 N. Y. 405), and permanently disabled, and unable to perform her services as aforesaid, and whereby plaintiff then lost and ever since has lost and will for a long time in the future lose the services of the said A. B.

IV. That by reason of the premises, plaintiff was forced to and did necessarily expend divers sums of money amounting to $..... in and about the nursing and taking care of the said A. B. and for medicines and medical attention, etc. (*allege other special damage*), and was caused great mental pain, distress and humiliation, all to his damage, $.....

Wherefore, plaintiff demands judgment against the defendant for the sum of $..... together with the costs of this action.

A. B. & C.,
Plaintiff's Attorneys.

Office and P. O. Address, ... Street, Albany, N. Y.

(Verification)

IV. ANNULMENT OF MARRIAGE.

No. 20.

Summons; Action to Annul Marriage.

See Form No. 36.

No. 21.

Affidavit of Service; Action to Annul Marriage.

See Form No. 37.

No. 22.

Affidavit as to Military Service.

See Form No. 38.

No. 23.

Petition to Annul Marriage; Marriage Procured by Fraud.

To the Honorable Justices of the Superior Court, holden at Springfield within and for the County of Hampden.

Respectfully libels, and represents William Allen, of Holyoke, in the County of Hampden, and Commonwealth of Massachusetts, that he was legally

married to Elsie Allen formerly Elsie Towne of said Holyoke, now of parts unknown, at said Holyoke, on the sixteenth day of October, A. D. 1913.

That said marriage was never consummated by assuming the duties of the marriage relations, and that they never lived together as husband and wife after the performing of said marriage; that on the day and date of said marriage, the libellee without cause, deserted your libellant and that such desertion was a part of a pre-conceived plan formed by the libellee prior to her marriage with the libellant never to live with him as his wife and assume her marriage duties with your libellant. That your libellant was induced to make said marriage contract, and to have the marriage performed upon the false, deceitful and fraudulent statements and promises made to him by the libellee that she would fulfil all her marriage vows and obligations to the libellant, all of which statements and promises the libellee knew to be false and untrue. That at the time of making said contract and at the time of said marriage the libellee knew that she would not live with him as his wife and deceived him, all of which was unknown to the libellant before said marriage was performed. That the libellant without his knowledge as to the deceit and fraud practiced on him by the libellee made said contract of marriage with her, and that the libellee deceitfully concealed from your libellant that she would never live with him as his wife and that she would never fulfil her marriage vows and obligations as made with him.

That your libellant was always willing to carry out his agreement and to comply with his marriage duties and obligations and gave no cause for the libellee to refuse to fulfil her duties and obligations as is required by the marriage vows and obligations.

That because of the deceit and fraud practiced upon him by the libellee, the libellant was led into a marriage contract and having the same performed according to the laws of the Commonwealth; and because of said deceit practiced upon the libellant by the libellee said marriage is null and void.

Wherefore, your libellant prays that said marriage of the libellee to your libellant may be decreed null and void, and for such further orders and decrees in the premises as to law and justice may appertain.

Dated the eighteenth day of October, 1913.

WILLIAM ALLEN.

Taken from *Anders* v. *Anders*, 224 Mass. 438.

No. 24.

Petition to Annul Marriage; Marriage Procured by Fraudulent Statements as to Pregnancy.

COMMONWEALTH OF MASSACHUSETTS.

NORFOLK, SS. SUPERIOR COURT.

To the Honorable the Justices of the Superior Court to be holden at Dedham within and for the County of Norfolk:

Respectfully libels and represents Henry Willett Sawyer, a minor, who bring this libel by his next friend, Charles R. Sawyer, his father, that he was born in Quincy in said County of Norfolk on the tenth day of March, A. D. 1895, and continuously since that day unto and including the day of the filing of this libel, has had his domicile in said Quincy; that on the twentieth day of December, A. D. 1913, at the town of Rockingham in the County of Windham and state of Vermont, he was married to Margaret Veronica Haskell, a woman then of the age of twenty-one years, then and now of Williamstown in the county of Berkshire and Commonwealth of Massachusetts; that the said marriage of your libellant to the said Margaret was without the consent of your libellant's said father, who then had the lawful control of your libellant; that your libellant was induced, by the fraud of the said Margaret, to contract the said marriage; that your libellant and the said Margaret have never lived together as husband and wife; that the said Margaret, at the time of said marriage, was pregnant with a child by some man other than your libellant, all of which the said Margaret then well knew; that the said Margaret knowingly did falsely pretend, represent and insist to your libellant that your libellant was the father of said child and was therefore bound to marry her, the said Margaret; that, previous to said marriage and for a long time thereafter, your libellant was ignorant of the laws of nature governing the reproductive functions of the human species, particularly as to the normal period of gestation, all of which ignorance on the part of your libellant the said Margaret then well knew; that the said Margaret, for a long time before said marriage, being as aforesaid with child by some man other than your libellant, wickedly and corruptly plotted and schemed to contract a marriage before that she would be delivered of the said child, and to that end, relying upon your libellant's said ignorance of the laws of nature, and designing and intending wickedly and corruptly to take advantage of said ignorance, as a part of and in pursuance of her wicked and corrupt plots and schemes, with great urgency and insistence, repeatedly knowingly did falsely pretend and represent to your libellant that your libellant was the father of said unborn child and did beget her with said child on or subsequent to the seventeenth day of July, A. D. 1913, and was therefore bound to marry her, the said Margaret; and during all said time, to and including the said twentieth day of December the said Margaret, well knowing her said pretensions and representations to be false, repeatedly and insistently urged your libellant, because of her said representations and pretensions, to marry her, the said Margaret; that your libellant, because of his said ignorance of the laws of nature and because he did not know that a lapse of time would prove the truth or falsity of said Margaret's said representations, was deceived by the said false representations and believed them to be true, and believed that he was the father of the said unborn child, and believed that he was, therefore, bound to marry the said Margaret; that your libellant, relying upon the said false representations of the said Margaret and, so as aforesaid because of his said

ignorance, believing them to be true, at the insistence of the said Margaret and because of his reliance and belief, married her, the said Margaret, as hereinbefore set forth; that on the eighth day of February, A. D. 1914, the said Margaret was delivered of a fully matured male child, being the child with which she had theretofore been pregnant by some man other than your libellant as hereinbefore set forth, which said child the said Margaret knowingly falsely pretended and represented to be your libellant's child and that your libellant had begotten her with said child on or subsequent to the seventeenth day of July, A. D. 1913, and your libellant, still being ignorant as aforesaid of the said laws of nature, believed the false pretensions and representations, that he was the father of said child, to be true and that he was in fact the father of said child; that, subsequent to the said eighth day of February, your libellant, from the instructions of his said father and by the reading of medical authorities, first learned of the laws of nature governing the reproductive functions and relating to the period of gestation and thereby that the said representations, so as aforesaid made to your libellant, were false and that he was not the father of said child; that your libellant doubts the validity of his said marriage to the said Margaret and prays that the said marriage be annulled.

Dated the twelfth day of May, A. D. 1914.

HENRY WILLETT SAWYER,
By his next friend,
CHARLES R. SAWYER.

Taken from *Safford* v. *Safford*, 224 Mass. 392.

No. 25.

Complaint; Action to Annul Marriage Because One of Parties Had Not Attained Age of Consent.

SUPREME COURT — COUNTY OF .....

A. B., through C. D., her Guardian *ad litem*, Plaintiff,

against

C. B., Defendant.

The plaintiff for a cause of action herein alleges:

I. That the plaintiff herein is an infant of less than the age of twenty-one years, having been born on the ..... day of ....., 18..; and that on the ..... day of ....., 19.., upon application duly made as provided by law, C. D. was appointed by the Hon. James Brant, a

justice of the Supreme Court [*or by Hon. James Brant, county judge of ..... county*], by an order which has been duly entered in the office of the Clerk of the County of ....., on the ..... day of ....., 19.., as guardian *ad litem* for such plaintiff for the purposes of this action.

II. That the plaintiff and the defendant were married on the ..... day of ....., 19.., at ....., county of ....., State of New York; and that at such times, and at all times since that time, such parties were and have been residents of such State.

III. That at the time the plaintiff and the defendant were so married, the plaintiff was not of the age of eighteen years, having been born on the ..... day of ....., 18..

IV. That such marriage has not been ratified by any mutual assent of the parties after the plaintiff herein attained the age of eighteen years, nor since such time has the plaintiff for any time freely cohabited with the defendant as husband [*or wife*].

Wherefore, the plaintiff herein prays that a judgment be had declaring such marriage contract void, and annulling such marriage, and for such other and further relief as may be just, with the costs of this action.

DAVID BENNETT,
Attorney for Plaintiff.

Office and Post-Office Address, 61 State Street, Albany, N. Y.

(Verification as in Form No. 15.)

No. 26.

Complaint; Action to Annul Marriage on Ground that Former Husband or Wife Is Living.

(Title of action.)

The plaintiff for a cause of action herein alleges:

I. That the above-named plaintiff and defendant were married at the city [*or village*] of ....., county of ....., State of New York, on the ..... day of ....., 19..; and that at such time the said plaintiff and defendant were residents of the State of New York, and that the plaintiff is now a resident of ....., county of ....., State of New York.

II. That the said plaintiff and defendant lived together as husband and wife from the time of said marriage until on or about the ..... day of ....., 19..

III. That at the time of said marriage the said defendant was the husband [*or wife*] of one L. M., who was then living; that the said defendant and the said L. M. were married at ....., county of ....., State of ....., on the ..... day of ....., 18..,

and at the time of the marriage of the above-named plaintiff and defendant the said marriage of the said defendant with the said L. M. was and still is in full force and effect.

IV. That when the marriage of the said plaintiff and defendant herein was contracted, plaintiff contracted the same in good faith and fully believed that L. M., the former husband [*or wife*] of the said defendant was dead [*or that the marriage between the said L. M. and the defendant had been dissolved; or if the former marriage of the defendant was unknown to the plaintiff, such fact should be stated; or if for any other reason the plaintiff supposed that the defendant was qualified to enter into the contract of marriage, it should be so stated in detail*].

V. That, the issue [*if any*] of the marriage between the plaintiff and the defendant herein is, one child, L. B., a boy [*or girl*] who was born, on the ..... day of ....., 19.., and that such child is now living.

Wherefore, the plaintiff prays that the marriage between the plaintiff and the defendant herein be annulled and declared void, and that it be adjudged that the said L. B., the issue of the marriage between the said plaintiff and the defendant be for all purposes the legitimate child of the plaintiff and be entitled to succeed as such, in the same manner as other legitimate children, to the real and personal estate of the said plaintiff, and that the said plaintiff be awarded the care and custody of said child, and for such other and further relief as may be just and proper, with the costs of this action.

DAVID BENNETT,
Attorney for Plaintiff.
Office and Post-Office Address, 61 State Street, Albany, N. Y.
(Verification.)

No. 27.

Complaint; Action to Annul Marriage on Ground of Lunacy.

(Title of action.)

The plaintiff for a cause of action herein alleges:

I. [*State allegation of marriage and residence as in preceding form.*]

II. That at the time such marriage was contracted the plaintiff was a lunatic, and as such lunatic was incapable of contracting such marriage.

III. That the plaintiff remained a lunatic until about the ..... day of ....., 19.., when he was restored to a sound mind, and has since that time ever been of a sound mind.

IV. That the said plaintiff and the defendant herein have not freely cohabited as husband and wife since the said plaintiff was so restored to sound mind.

V. [*Allege as to whether or not children have been born as the issue of such marriage.*]

Wherefore, the plaintiff prays that a judgment be had annulling such marriage and declaring such marriage contract void; [*in case of children having been born of such marriage, judgment should be prayed in the same manner prescribed in the preceding form*] and such other and further relief as may be just and proper, with the costs of this action.

DAVID BENNETT,
Attorney for Plaintiff.
Office and Post-Office Address, 61 State Street, Albany, N. Y.

(Verification.)

No. 28.

Complaint; Action to Annul Marriage for Force or Duress.

(Title of action.)

The plaintiff for a cause of action herein alleges:

I. [*Allege marriage and residence as in Form No. 26.*]

II. That the consent of the plaintiff to said marriage was obtained by force and duress, and that the plaintiff was made to believe that if he did not marry the said defendant the brother of said defendant would shoot and kill him, the said plaintiff, and that serious violence would be committed upon him by defendant's father, and the said defendant's brother threatened to kill said plaintiff if he did not marry the defendant, which threats were made with the knowledge and concurrence of the defendant: that in the fear that said threats would be carried out and that plaintiff would be killed or grievously wounded and hurt if he did not the said plaintiff married the defendant to avoid such hurt or death.

III. That the said plaintiff and defendant have never since such marriage cohabited together as husband and wife.

Wherefore the plaintiff demands judgment that the aforesaid marriage be annulled and declared void, and that each of the parties be freed from the obligations thereof, and for such other relief as may be necessary, with the costs of this action.

CHARLES J. PATTERSON,
Attorney for Plaintiff.

(Verification.)

(NOTE.—The form of the above complaint is taken from that used in the case of *Anderson* v. *Anderson*, 147 N. Y. 719.)

No. 29.

Proposed Findings of Fact and Conclusions of Law.

(Title)

The plaintiff (*or defendant*) in the above entitled action hereby submits the following findings of fact, which he deems established by the evidence on

the trial of this action, and the rulings on the questions of law which plaintiff (*or defendant*) desires the court (*or referee*) to make herein:

FINDINGS OF FACT

(*Here set forth the findings of fact as in Form No.* 31.

CONCLUSIONS OF LAW

(*Here set forth the conclusions of law as in Form No.* 31.)

A. B. & C.,
Plaintiff's Attorneys.

Office and P. O. Address, ... Street, Albany, N. Y.

No. 30.

Defendant's Exceptions.

NEW YORK SUPREME COURT,
NEW YORK COUNTY.

A. B.,
Plaintiff,
against
C. B.,
Defendant.

To
William F. Schneider, Esq.,
Clerk New York County,
County Court House,
Manhattan Borough,
New York City, and
W. X., Esq.,
Plaintiff's Attorney,
..... Street,
Manhattan Borough,
New York City.

Gentlemen:

TAKE NOTICE, that the defendant hereby excepts to the decision, findings of fact and conclusions of law of Mr. Justice Francis K. Pendleton, dated January 10, 1919, and filed in the office of the Clerk of the County of New York, on January 17, 1919, in the following particulars:

I. To the fourth finding of fact, on the ground that such finding is without any evidence tending to sustain it, and is against the evidence.

II. To the conclusion of law numbered first on the ground that it is not supported by any finding of fact and that such conclusion is against the weight of evidence in the case.

III. The defendant also excepts to the refusal of the Court to find requests Nos. 4 and 5 of defendant's proposed findings of fact, and requests Nos. 3 and 4 of defendant's proposed conclusions of law.

Dated, New York, February 3, 1919.

Yours, etc.,
Y. Z.,
Defendant's Attorney.
..... Street, Manhattan Borough, New York City.

No. 31.

Decision After Trial; Annulment of Marriage.

At a Trial Term of the Supreme Court, State of New York, held in and for the Third Judicial District at the County Court House in the City of Albany, New York, on the 14th day of February, 1920.

Present: Hon. HAROLD J. HINMAN,
Justice Presiding.

A. B.,
Plaintiff,
against
C. B.,
Defendant.

This action having regularly come on to be heard before Hon. Harold J. Hinman, one of the Justices of this Court, without a jury, at a Trial Term of this Court, held on the 14th day of February, 1920, and the allegations and proofs of the parties having been heard, and the plaintiff having appeared by X. Y., his attorney, and the defendant having appeared by W. Z., her attorney, and due deliberation having been had, I find and decide as follows:

FINDINGS OF FACT.

I. That the plaintiff and defendant were married at the City of Albany, New York, on the 24th day of August, 1904, and lived and cohabited together as husband and wife until on or about September 1, 1904.

II. That the defendant above named was, prior to said marriage, to wit, on the 1st day of July, 1899, married to one E. F., and that at the time of the marriage of the above-named plaintiff and defendant, the said marriage of the said defendant with the said E. F. was in full force and effect.

III. That the issue of the marriage between the plaintiff and defendant was a son, D. B., who was born on the 1st day of June, 1905.

IV. That the marriage between the plaintiff and the defendant was contracted by the plaintiff in good faith and without any knowledge on the part of the plaintiff of the former marriage of the defendant with the said E. F.

CONCLUSIONS OF LAW.

I. That the plaintiff is entitled to final judgment, unless the court shall otherwise order in the meantime, three months after the filing of the decision herein and the entry of interlocutory judgment, annulling the marriage contracted between the plaintiff, A. B., and the defendant, C. B., which was solemnized on the 24th day of August, 1904, on the ground that the former wife of defendant is living and his former marriage being in force; *and, unless otherwise ordered, the plaintiff is hereby required to enter final judgment.*

II. That the said D. B., the issue of the marriage between the plaintiff and the defendant, shall be deemed the legitimate child of the plaintiff A. B.

III. That the plaintiff be awarded costs to be taxed, but the judgment therefor shall not be enforceable by execution or punishment until final judgment herein.

I direct interlocutory judgment accordingly.

ENTER: HAROLD J. HINMAN,
Justice Supreme Court.

NOTE.—Portion in italics to be inserted where court requires entry of final judgment.

No. 32.

Interlocutory Judgment After Trial; Annulment of Marriage.

At a Trial Term of the Supreme Court, State of New York, held in and for the Third Judicial District at the County Court House in the City of Albany, Albany County, N. Y., on the 14th day of February, 1920.

Present: HON. HAROLD J. HINMAN,
Justice Presiding,

A. B.,
Plaintiff,

against

C. D.,
Defendant.

(Recitals as in Form No. 31, adding:) and the court having made findings of fact and conclusions of law deciding, among other things, that the plaintiff

is entitled to a judgment against the defendant annulling the marriage contracted by the parties hereto:

NOW, ON MOTION OF X. Y., attorney for the plaintiff, it is

ORDERED, ADJUDGED AND DECREED that the plaintiff have final judgment herein, unless the Court shall otherwise order in the meantime, three months after the filing of the decision herein and entry of this interlocutory judgment, annulling the marriage contracted between the plaintiff, A. B., and the defendant, C. B., which was solemnized on the 24th day of August, 1904, on the ground that the former wife of defendant is living and his former marriage being in full force; and that D. B., the issue of said marriage between plaintiff and defendant, shall be deemed the legitimate child of the plaintiff, and it is further

ORDERED, ADJUDGED AND DECREED that this judgment is interlocutory only, and it is further

ORDERED, ADJUDGED AND DECREED that three months after the entry of this interlocutory judgment and the decision herein this interlocutory judgment shall become the final judgment herein as of course, unless the Court in the meantime shall have otherwise ordered.

[*ORDERED, ADJUDGED AND DECREED that final judgment shall not be entered in this action until after the expiration of three months from the entry and filing of the decision and this interlocutory judgment, and that within thirty days after the expiration of said three months, final judgment shall be entered upon said decision and interlocutory judgment unless otherwise ordered by the Court.*]

ORDERED, ADJUDGED AND DECREED that costs to be taxed are hereby awarded to the plaintiff and against the defendant, but the judgment therefor shall not be enforceable by execution or punishment until this interlocutory judgment becomes the final judgment as of course [*or until the entry of final judgment in this action*].

ENTER:

HAROLD J. HINMAN,
Justice Supreme Court.

No. 33.

Notice of Motion on Application for Final Judgment.

(Title.)

PLEASE TAKE NOTICE, that on the annexed affidavit of A. B., verified the ..... day of ....., 19.., and on the interlocutory judgment herein, made the ..... day of ....., 19.., and entered in the office of the Clerk of the County of Albany, on the ..... day of ....., 19.., and on all the pleadings and proceedings in this action, a motion will be made at a Special Term of this court, appointed to be held at the County Court House in the City of Albany, N. Y., on the ..... day of .....,

19.., on the opening of court on that day, or as soon thereafter as counsel can be heard, for final judgment annulling the marriage between the plaintiff and defendant, providing for the payment of alimony to plaintiff by defendant (*here set forth other matters to be inserted in the final judgment or attach a proposed final judgment and here refer to it*), and for such other and further relief as to the court may seem just.

Dated, June 1, 1920.

Yours, etc.,
A., B. & C.,
Plaintiff's Attorneys.

Office & P. O. Address, ... Street, Albany, N. Y.

To
J. B.,
Defendant's Attorney.

No. 34.

Affidavit on Application for Final Judgment.

(Title.)

STATE OF NEW YORK, } ss.:
COUNTY OF ALBANY, }

A. B., being duly sworn, deposes and says:

1. That he is the attorney for the plaintiff in the above-entitled action, and that on or about the ..... day of ....., 19.., the Court duly made its decision herein, annulling the marriage between the plaintiff and the defendant, and the said decision was duly filed in the office of the Clerk of the County of Albany on said day; that on the ..... day of ....., 19.., interlocutory judgment thereon was duly entered in the office of the Clerk of the County of Albany; that a copy of said interlocutory judgment is hereto annexed.

2. That more than three months have elapsed since the filing of said decision and the entry of said interlocutory judgment, and that said interlocutory judgment provided for the entry of final judgment herein within thirty days after the expiration of said period of three months, unless the court shall have otherwise ordered;

3. That the Court has not forbidden the entry of final judgment herein nor has any order or decree been made in this action since the entry of said interlocutory judgment, and that no application has been made for any order or direction herein since the entry of said interlocutory judgment.

.....

Sworn to before me, this .....
day of ....., 19... }

.....

No. 35.

Final Judgment; Annulment of Marriage.

(Title.)

(Recitals as in Form No. 31, adding:) and the Court having made findings of fact and conclusions of law, deciding among other things that the plaintiff is entitled to a judgment against the defendant annulling the marriage contracted by the parties hereto, and interlocutory judgment having been entered thereon and the said decision having been filed in the office of the Clerk of the County of Albany on the ..... day of ....., 19.., and said interlocutory judgment having been entered in said Clerk's office on the ..... day of ....., 19.., and it appearing that three months have elapsed since the filing of said decision and the entry of said interlocutory judgment and that no order has been made by the Court herein forbidding the entry of final judgment herein, or in any wise affecting the right of the plaintiff to enter final judgment, and that no application for such an order has been made, and on reading and filing the affidavit of ....., verified the ..... day of ....., 19... and the notice of the motion for final judgment, dated the ..... day of ....., 19.., and due proof of the service thereof upon ....., attorney for the plaintiff, by affidavit of ....., verified the ..... day of ....., 19.., and after due deliberation, it is, on motion of X. Y., attorney for the plaintiff, no one appearing in opposition,

ORDERED, ADJUDGED AND DECREED that the marriage contracted between the plaintiff, A. B., and the defendant, C. B., which was solemnized on the 24th day of August, 1904, be and the same hereby is annulled.

ORDERED, ADJUDGED AND DECREED that the said D. B., the issue of said marriage, is and shall be deemed the legitimate child of the plaintiff; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff recover of the defendant the sum of ..... dollars ($.....) costs as taxed, and have execution therefor.

ENTER:

HAROLD J. HINMAN,
Justice Supreme Court.

IV. ABSOLUTE DIVORCE.

No. 36.

Summons.

STATE OF NEW YORK — SUPREME COURT, COUNTY OF ALBANY.

A. B.,
Plaintiff,
against
C. D.,
Defendant.

[*"Action for a Divorce" or "Action to Annul a Marriage" or "Action for a Separation" as the case may be.*]

To the above-named Defendant

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer on the plaintiff s attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the County of Albany.

Dated, Albany, N. Y., January 10, 1920.

A., B. & C.,
Plaintiff's Attorneys.

Office and Post Office Address, 452 Broadway, Albany, N. Y,

No. 37.

Affidavit of Personal Service of Summons.

(Title.)

STATE OF NEW YORK,
COUNTY OF ....., } *ss.:*
City of .....,

R. S., being duly sworn, deposes and says: That he is a resident of the City of ....., County of ....., State of New York, and is (*a clerk in the office of the attorney for the plaintiff in the above-entitled action*), and that on the ..... day of ....., he personally served the annexed summons on C. B., the above-named defendant, at (*stating place where service was made, describing it with some particularity*), by delivering to and leaving with him a copy of said summons; that at the time of such service deponent was more than twenty-one years of age;

That there was written (*or printed*) upon the face of the copy of the summons so delivered to the above-named defendant the inscription "Action for a divorce" (*or "Action to annul a marriage" or "Action for a separation," as the case may be*);

That he knew the person so served to be the person mentioned and described in such summons as the defendant herein; that his knowledge that the person so served was the defendant and the proper person to be served is derived from his personal acquaintance with the said defendant for a period of ..... years, and from the fact that he has known that the plaintiff and the defendant herein resided together as husband and wife for a period of ..... years, at ..... Street, in the city (*or village*) of ....., N. Y.; (*or state such other facts known to deponent as will show that deponent knew personally the defendant served by him. Where deponent did not know personally the defendant so served, he must state in detail the method used by him in ascertaining the identity of the defendant*).

.....

Subscribed and sworn to before me, this ..... day of ....., 19..

.....

No. 38.

Affidavit as to Military Service.

(Title.)

STATE OF NEW YORK,
COUNTY OF ALBANY, } ss
City of Albany,

A. B., being duly sworn, deposes and says that he resides in the ....., of ....., N. Y., and is ..... the Attorney for ....., the Plaintiff in the above-entitled action; that he knows the Defendant, ..., and that to the best of the knowledge, information and belief of deponent said Defendant is not now in the Military Service of the United States as defined and specified under Act of Congress approved March 8, 1918, and entitled "The Soldiers and Sailors' Civil Relief Act," and any amendments thereto.

That the sources and grounds of deponent's information and belief are as follows: (*Here recite facts as, for instance, that ..... stated that he was not in the military service, and that he was dressed in civilian clothes, etc.*)

.....

Sworn to before me, this ..... day of ....., 19...

.....

No. 39.

Complaint; Action for Divorce.

(Title of action.)

The plaintiff, for a cause of action herein, alleges:

I. That the plaintiff and the defendant were married on the ..... day of ....., 19.., at the city of ....., county of ....., State of New York.

II. (*Allege in case parties were not married within the State:*) That the above-named plaintiff and defendant are now and have been since such marriage residents of the city of ....., county of ....., State of New York (*or state such other jurisdictional matters as are required by section* 1756 *of the Code of Civil Procedure*).

III. That, upon information and belief, since the date of said marriage, and on or about the ..... day of ....., 19.., at ....., in the city of ....., county of ....., State of ..... (*here definitely state time and place of alleged adultery*), the defendant committed adultery with ..... (*stating name of person with whom adultery was committed*).

(*If the name of the person with whom the adultery was committed is unknown, the allegation may be as follows: That on or about the ..... day of ....., 19.., at ....., in the city of ....., county of ....., State of ....., the defendant committed adultery with a woman whose name is unknown to the plaintiff.*)

IV. That at divers places within the city of ....., county of ....., State of ....., and at various times between the ..... day of ....., 19.., and at the time of bringing this action, at what particular times and places plaintiff is unable to state, the defendant has committed adultery with one A. B. (*or with divers persons to the plaintiff unknown*).

V. That such adultery was committed without the consent, connivance, privity or procurement of the plaintiff.

VI. That five years have not elapsed since the discovery by the plaintiff of the fact that such adultery had been committed by the defendant, and that the plaintiff has not voluntarily cohabited with the defendant since such discovery (*and also where at the time of the offense charged the defendant was living in adulterous intercourse with the person whom the offense is alleged to have been committed, it should be alleged that five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff.*)

VII. That the plaintiff has not forgiven or condoned such adultery, and that no action for a divorce has been brought by the defendant against this plaintiff, nor has a judgment or decree in such an action ever been obtained in any court of any state, territory or foreign country.

VIII. That the plaintiff is not possessed of any real or personal property in her own name, and that she has no means of livelihood except such as are afforded her by the above-named defendant; that the defendant is seized and possessed of real and personal property to the value of ..... dollars; that he is engaged in the business of (*state nature of business or employment*), and that his annual income is at least the sum or ..... dollars.

IX. That the following children have been born of the marriage between the above-named plaintiff and defendant: (*State names of children and dates of birth.*)

Wherefore the plaintiff prays judgment divorcing the said plaintiff and defendant, and that their marriage be dissolved; that the plaintiff be awarded the care and custody of the above-named children; that the defendant be required to make suitable provisions for the support, maintenance and education of such children and for the support of this plaintiff, and that the plaintiff have temporary alimony; and for such other and further relief as may be just and proper, with the costs of this action.

DAVID BENNETT,
Attorney for Plaintiff.

Office and Post Office Address, 61 State Street, Albany, N. Y.

(Verification.)

No. 40.

Answer; Defenses of Forgiveness, Connivance, Etc., and Counterclaim for Adultery.

(Title)

The defendant, for his answer to the plaintiff's complaint herein:

I. Denies the allegations of paragraphs marked "III," "IV" and "V" (*and any other allegations controverted*) of the complaint.

II. And for a further and separate defense to the alleged cause of action set forth in the plaintiff's complaint, the defendant alleges that the adultery charged in the complaint and alleged to have been committed by defendant with A. B., on or about the ..... day of ....., 19.., was committed by the procurement and with the connivance of the plaintiff as follows, to wit: (*here set forth the facts*)

III. And for a further and separate defense to the alleged cause of action set forth in the plaintiff's complaint, the defendant alleges that prior to the commencement of this action the adultery alleged to have been committed by the defendant with A. B., on the ..... day of ....., 19.., was discovered by the plaintiff, such discovery having been made on or about

the ..... day of ....., 19.., and that the plaintiff knowing the same to have been committed, forgave the defendant and thereupon voluntarily cohabited with the defendant as his wife, and resided and lived with him at ..... Street, in the City of ....., N. Y., and that the plaintiff did so live and cohabit with the defendant as his wife from the ..... day of ....., 19.., to the ..... day of ....., 19.. (*or set forth facts showing forgiveness by the plaintiff affirmatively*).

IV. And for a further and separate defense to the alleged cause of action set forth in the plaintiff's complaint, the defendant alleges that on or about the ..... day of ....., 19.., and more than five years prior to the commencement of this action, the adultery alleged to have been committed by the defendant with A. B. on the ..... day of ....., 19.., was discovered by the plaintiff, and that the plaintiff then knew and ever since has known that said adultery was committed by the defendant.

V. And for a further and separate defense to the alleged cause of action set forth in the plaintiff's complaint, the defendant alleges that on or about the ..... day of ....., 19.., at the ..... Hotel in the City of Albany, N. Y., the plaintiff committed adultery with one C. D.; that said adultery was committed without the consent, connivance, privity or procurement of the defendant; that five years have not elapsed since the discovery of the fact by defendant that such adultery had been committed, and that the defendant has not voluntarily cohabited with the plaintiff since the commission of said act of adultery, and the discovery thereof by defendant; that there is not now pending in any court of competent jurisdiction any action between the parties hereto, other than this action, for a divorce upon the ground of adultery or any other ground, nor has any decree been granted by any court of competent jurisdiction in such an action.

VI. And for a counterclaim to the alleged cause of action set forth in plaintiff's complaint, the defendant alleges: (*here set forth all the facts necessary to be alleged in a complaint for a divorce as in Form No. 39.*)

WHEREFORE, the defendant demands judgment in his favor, dissolving the marriage between the plaintiff and the defendant and divorcing plaintiff and the defendant, together with the costs of this action.

A., B. & C.,
Defendant's Attorneys.

Office and P. O. Address, ... Street, Albany, N. Y.

STATE OF NEW YORK,
COUNTY OF ALBANY, } *ss.:*

....., being duly sworn, deposes and says that he is the defendant in the above entitled action; that he has read the foregoing counterclaim and knows the contents thereof; that the said answer in respect to such counterclaim is true to the knowledge of deponent, except as to the matters

therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

.....

Sworn to before me, this .....
day of ....., 19..

.....

.....

(NOTE: *The answer of the defendant may be made without verifying it notwithstanding the verification of the complaint, except that an answer containing a counterclaim which charges adultery must be verified in respect to such counterclaim, where the complaint is verified.* Code, Sec. 1757.)

No. 41.

Notice of Appearance by Co-respondent.

(Title of action.)

Take notice, that X. Y., the person named in the above-entitled action for a divorce, as co-respondent, appears in such action, and that I am retained by and appear as attorney for him therein, and demand that a copy of the summons and complaint and other papers and notices in this action be served on me at my office, No. .... Street, Albany, N. Y.

Dated .....

L. M.,
Attorney for Co-respondent.

Office and P. O. Address, ... Street, Albany, N. Y.

To DAVID BENNETT,
Attorney for Plaintiff.

No. 42.

Answer of Co-respondent.

(Title of action.)

The answer of the co-respondent named in the complaint in the above-entitled action respectfully shows to this court:

I. That he has been named in the complaint of the plaintiff in the above-entitled action as co-respondent and is charged with the commission of adultery with the defendant in the following allegations of the complaint: (*Here quote allegations to be denied.*)

II. That he denies the said allegations of the complaint.

Wherefore, he prays judgment against such plaintiff for his costs herein as provided by law.

L. M.,
Attorney for Co-respondent.

Office and P. O. Address, ... Street, Albany, N. Y.

(Verification.)

No. 43.

Affidavit for Order Directing Trial by Jury.

(Title of action.)

STATE OF NEW YORK, }
COUNTY OF....., } *ss.:*
(City of.....) }

L. M., being duly sworn, deposes and says:

I. That he is the attorney for the plaintiff in the above-entitled action;

II. That such action is brought to procure a divorce upon the ground of the adultery of the defendant, as charged in the complaint herein, and that the answer of the defendant puts in issue the allegations of adultery as contained in such complaint;

III. That such action was commenced by the service of a summons and complaint upon the defendant on the ..... day of ....., 19..; and that the defendant served his answer herein on the ..... day of ....., 19..; and copies of such summons and complaint, and the affidavit of service thereof is annexed hereto, and marked Exhibit A; a copy of the answer to such complaint is annexed hereto, and marked Exhibit B;

IV. That the plaintiff herein desires that the issues of fact pertaining to the adultery should be tried by a jury, and that an order be granted by this court directing that such issues be so tried. A statement of such issues of fact desired to be tried is hereto annexed.

Sworn to before me, this ..... day of ....., 19.. }

No. 44.

Notice of Motion for Order Directing Trial by Jury.

(Title of action.)

Take notice, That upon the affidavit of L. M., attorney for the plaintiff in the above-entitled action, and upon the summons and complaint, affidavit of service thereof and the answer of the defendant herein, copies of which

are served herewith upon you, the said L. M., attorney for the plaintiff herein, will move this court at a Special Term thereof to be held at (*county courthouse, city hall or chambers, as the case may be*), in the city (*or village*) of ....., on the ..... day of ....., 19.., at ten o'clock in the forenoon (*or at the opening of court*), or as soon thereafter as counsel can be heard, for an order directing the trial by a jury of the issue arising on the allegation of adultery herein and preparing and settling the question to be tried and distinctly and plainly stating the same for trial accordingly and for such other relief as to the court may seem just and proper.

A copy of such issues of fact, which it is desired should be submitted to a jury, is hereto annexed and served upon you.

Dated .....

L. M.,
Attorney for Plaintiff.

Office and P. O. Address, ... Street, Albany, N. Y.

To J. F.,
Attorney for Defendant.

No. 45.

Proposed Issues of Fact to be Tried by Jury.

(Title of action.)

STATEMENT OF PROPOSED ISSUES OF FACT TO BE SUBMITTED TO JURY.

The following questions of fact are desired by the plaintiff to be submitted to the jury for trial:

I. Did the defendant, on the ..... day of ....., 19.., at ....., in the city (*or village*) of ....., county of ....., State of ....., commit adultery with .....?

(*Each of the questions of fact should be distinctly stated and with sufficient certainty as to the charges of misconduct on the part of the defendant, so that complete opportunity may be given to meet such charges by proof upon the trial. See* Decarrillo v. Decarrillo, 53 Hun, 359.)

No. 46.

Proposed Amendments to Issues.

(Title of action.)

The following amendments are proposed by the defendant to the issues of fact proposed to be submitted by the plaintiff to a jury in this action:

I. Strike out question No. I, and insert in its place the following: (*State definitely the proposed substitute for such question.*)

J. F.,
Attorney for the Defendant.

Office and P. O. Address, ... Street, Albany, N. Y.

Take notice, That the defendant herein proposes the foregoing amendments to the issues of facts proposed by the plaintiff for trial by a jury in the above-entitled action.

Dated .....

J. F.,
Attorney for the Defendant.

Office and P. O. Address, ... Street, Albany, N. Y.

To L. M.,
Attorney for the Plaintiff.

No. 47.

Order Directing the Trial of Issues by Jury.

At a Special Term of the Supreme Court, held in and for the county of ....., at ....., in ....., in the said county, on the ..... day of ....., 19...

Present: HONORABLE A. B., Justice.

(Title of action.)

On reading and filing the summons, the pleadings in this action, and proof of service of the summons and complaint and the affidavit of L. M., attorney for the plaintiff, and on the statement of issues of fact arising thereon, proposed by the above-named plaintiff to be submitted to a jury for trial, and on the amendments proposed by the defendant to such issues, and on hearing the said L. M., of counsel for the plaintiff, and N. O., of counsel for the defendant in opposition, now, on motion of L. M., attorney for the plaintiff, it is

ORDERED, that the following questions of fact, involved in the issues arising upon the pleadings herein, be tried by a jury, it is hereby further

ORDERED, that such trial be had at a Trial Term of this court to be held at ....., in the city of ....., on the ..... day of ....., 19.., or as soon thereafter as the same may be heard.

The following are the questions of fact to be submitted hereunder:

First. (*State questions of fact as settled.*)

ENTER:

A. B.,
J. S. C.

No. 48.

Order of Reference.

At a Special Term, etc. (see Form No. 47).

(Title of action.)

The summons, with a copy of the complaint in this action, having been personally served upon the defendant on the ..... day of ....., 19.., at ....., in the city of ....., county of ....., State of ....., and the defendant having duly appeared and answered, and a consent having been entered into between the parties hereto that the issues in this action be referred to a referee to be appointed by the court to hear and determine the same, and on motion of ....., attorney for the plaintiff, it is hereby

ORDERED, that such issues be referred to ....., attorney-at-law, of the city (*or village*) of ....., county of ....., to hear the same, and to take proof thereof and report such proof to this court, together with his proceedings thereon, with all convenient speed. (See Form No. 49 for additional provisions.)

ENTER:

L. S.,
J. S. C.

No. 49.

Referee's Report.

(Title)

TO THE SUPREME COURT:

The undersigned was heretofore appointed referee herein, pursuant to an Order entered herein on Septembr 24, 1917, with the following instructions:

ORDERED, that the issues in the above entitled action be referred to Alvah E. Burlingame, Jr., Esq., of the County of Kings, to take the proofs offered by the respective parties, and to report with the testimony and his opinion thereon to this court, with all convenient speed; and it is further

ORDERED, that said referee inquire into the situation and value of the property and income of the defendant, and as to what would be a reasonable and proper sum to be allowed to the plaintiff for alimony and for her support and maintenance during her life, and for the support and maintenance and the education of her children, F. B. and G. B., until they shall have arrived at the age of twenty-one years respectively; and it is further

ORDERED, that said referee inquire and report in regard to the ages and circumstances of said children, and as to who would be the proper person to take the care and custody of such children, with such other facts in regard

thereto as the parties claiming the custody of said children shall bring before the said referee and as to him shall seem pertinent and proper.

The Referee respectfully reports as follows:

Before proceeding with the matter I took the oath required by law.

The matter was duly brought on before me for a hearing; that the plaintiff, A. B., appeared before me in person, also her counsel, C. D. The defendant, C. B., appeared before me in person, also his counsel, L. D.

That I have heard all the allegations of the parties and have taken and reduced to writing the testimony offered by them, which testimony and my oath are filed with this report, together with certain exhibits offered and received in evidence, and after due deliberation thereon, I find as matters of fact and conclusions of law, as follows:

FACTS.

FIRST.— That on the 9th day of July, 1900, the parties intermarried at the City of Philadelphia, in the State of Pennsylvania, and thereafter and until June, 1909, the parties lived together as husband and wife, and that during said time they had two children, namely: F. B., a daughter, born April 26th, 1902, and G. B., a son, born July 24th, 1903. That the plaintiff separated from her husband in 1909.

SECOND.— That the plaintiff and defendant are both residents of this State, to wit: The plaintiff residing in Kings County and the defendant residing in New York County, and the parties at the time of the commission of the adultery hereinafter mentioned, and at the time of the commencement of this action were and still are residents and inhabitants of this State.

THIRD.— That the defendant, C. B., during or about the month of June, 1914, on three occasions committed adultery with one known as X. Y., sometimes known as "Bessie," at ————————, New York City.

FOURTH.— That the said adultery so as aforesaid committed by defendant, was without the consent, connivance, privity or procurement of the plaintiff and that five years have not elapsed since said plaintiff discovered the commission of said adultery by defendant, and that since the discovery thereof she has not voluntarily cohabited with said defendant, nor has plaintiff forgiven the same.

FIFTH.— That there is no judgment or decree in any court of the State of competent jurisdiction against the plaintiff in favor of the defendant for a divorce on the ground of adultery, and that there is no judgment or decree of absolute divorce between the parties hereto rendered by any court, having jurisdiction to grant the same, in any State, Territory or dependency of the United States, or in any foreign country.

SIXTH.— That the defendant is employed by W. & L., stockbrokers, at ————————, New York City, as Manager, at a salary of Five thousand 00/100 ($5,000.00) Dollars a year, which is his only source of income.

SEVENTH.— That the situation in respect to the children is as follows: F B., the daughter, was seventeen years old in April, 1919, and G. B., the

son, will be sixteen years of age in June, 1919. That the daughter lives with her aunt, A. H., at Trenton, New Jersey, wife of D. H. Mrs. H. is the sister of the defendant. That F. B. has attended the ———— School at Newton, Pa., for two years, and on finishing another two years is expected to enter Vassar College. That the defendant pays his daughter's tuition and maintenance, amounting to more than Five hundred ($500.00) Dollars; furnishes the girl her clothes and spending money, amounting in all to a sum estimated at Eight hundred ($800.00) Dollars a year, etc.

The son has been in the care of his uncle, etc.

That it will be for the best interests of the children not to interfere with the provisions already made for their support and education, they having been apart from the mother as heretofore indicated for ten years and upward. The plaintiff, the mother of the children, is satisfied with the present arrangement except that she requests the custody of the children.

The Referee finds as Conclusions of Law:

FIRST.— That a divorce should be decreed in favor of the plaintiff, A. B., and against the defendant, C. B., on the ground of his said adultery.

SECOND.— That the custody of F. B., age seventeen years, should be awarded to her aunt, Mrs. H., and the custody of G. B., age fifteen years, should be awarded to his uncle, W. X., and that the judgment should provide that the plaintiff and defendant be entitled to see their children at all suitable times.

THIRD.— That the defendant pay all of the expenses for the support and education of his respective children.

FOURTH.— That the defendant should pay the plaintiff the sum of Twelve hundred 00/100 ($1,200.00) Dollars per year for her own support.

FIFTH.— That there is no evidence before the Referee of the amount of counsel fee awarded in this action and the question of costs is respectfully submitted to the Court.

Dated, May 22nd, 1919.

ALVAH W. BURLINGAME, JR.,
Referee.

No. 50.

Interlocutory Judgment on Referee's Report.

(Caption and Title)

This cause coming on regularly to be heard before me, the undersigned, one of the Justices of this Court, at a Special Term, Part I thereof, on the eleventh day of July, 1919, upon the order herein, entered the twenty-fourth day of September, 1917, and the report of Alvah H. Burlingame, Jr., Esq., the referee thereby appointed, which was filed the ninth day of June, 1919, and satisfactory evidence having been produced to the Court on the part

of the plaintiff, proving the material allegations of the complaint, and showing also that there is no judgment or decree of any court of the State of competent jurisdiction against plaintiff in favor of the defendant for a divorce upon the ground of adultery; and on reading and filing the notice of motion herein, dated July 3, 1919, and the affidavit of C. D., verified July 3, 1919, on behalf of the plaintiff, and the affidavit of L. D., verified July 10, 1919, on behalf of the defendant; and after hearing C. D., Esq., for the plaintiff, and L. D., Esq., for the defendant, the Court, after due deliberation, having granted this application and made its decision thereon;

Now, on motion of C. D., attorney for the plaintiff, it is

ORDERED, ADJUDGED AND DECREED, that said application to confirm said report and for judgment thereon be and the same hereby is granted in all respects, and the finding of fact and conclusions of law of the said referee, contained in said report, hereby are made the findings and decisions of the Court, and it is further

ORDERED, ADJUDGED AND DECREED, that, unless the Court shall otherwise order in the meantime, there shall be entered in this action, three months after the filing of the decision herein, and entry of this interlocutory judgment a final judgment for an absolute divorce in favor of the plaintiff, H. B., and against the defendant, C. B., by reason of the adultery of the defendant and as prayed for in the complaint herein; and it is further

ORDERED, ADJUDGED AND DECREED, that this judgment is interlocutory only and ineffectual to dissolve the marriage relations existing between the parties hereto, and it is further

ORDERED, ADJUDGED AND DECREED, that the custody of F. B., one of the children of said marriage, is hereby awarded to her aunt, A. H., and the custody of G. B., the other of said children, is hereby awarded to his uncle, P. B., and that both the plaintiff and defendant be permitted to see said children at all suitable times, and that the defendant shall pay all of the expenses for the support and education of said children; and it is further

ORDERED, ADJUDGED AND DECREED, that the said defendant pay to the said plaintiff the sum of twelve hundred dollars per annum, from the date of this judgment, in equal monthly payments of one hundred dollars per month in advance, for the support and maintenance of said plaintiff during her natural life; and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant pay to the plaintiff or to her attorney the sum of one hundred and fifty dollars as and for an extra allowance of costs and counsel fee herein.

ENTER:

C. H. K.,

Justice of the Supreme Court.

No. 51.

Libel for Divorce; Desertion.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT. DUKES COUNTY, SS.

TO THE HONORABLE THE JUSTICES OF THE SUPERIOR COURT, next to be holden at Edgartown within and for the County of Dukes County:

RESPECTFULLY libels and represents John Felton, otherwise John Felteno of Edgartown in said County, that he was lawfully married to Annie L. Felton now of said Edgartown at New Bedford in the County of Bristol on the eleventh day of January, A. D. 1891, and thereafterwards your libellant and the said Annie L. Felton lived together as husband and wife in this Commonwealth, to wit: at Edgartown aforesaid until on or about April 1, 1909; that your libellant has always been faithful to his marriage vows and obligations, but the said Annie L. Felton being wholly regardless of the same at said Edgartown on or about the first day of April, A. D. 1909, did wholly desert your libellant and has ever since wholly deserted him.

WHEREFORE your libellant prays that a divorce from the bonds of matrimony may be decreed between your libellant and the said Annie L. Felton.

Dated the ninth day of August, A. D. 1915.

JOHN FELTON.

(Taken from *Foster* v. *Foster*, 225 Mass. 183.)

No. 52.

Libel for Divorce; Desertion.

To the Honorable the Justices of the Superior Court, to be holden at Boston, within and for the County of Suffolk:

Respectfully libels and represents Mary M. Norton, of Boston, in said County, that she was lawfully married to Michael J. Norton, now of Boston, at said Boston on the 23rd day of January, A. D. 1910, and thereafterwards your Libellant and the said Michael J. Norton lived together as husband and wife in this Commonwealth, to wit: at Boston; that your Libellant has always been faithful to her marriage vows and obligations, but the said Michael J. Norton, being wholly regardless of the same, at Boston, on or about the 15th day of January, A. D. 1911, utterly deserted her and has continued such desertion from this time to the date hereof, being more than three consecutive years next prior to the filing of this libel.

Wherefore your Libellant prays that a divorce from the bonds of matri-

mony may be decreed between your Libellant and the said Michael J. Norton, and for such other orders and decrees as to your Honors shall seem meet, and as justice may require.

Dated the 22nd day of July, A. D. 1916.

MARY M. NORTON.

(Taken from *Najjar* v. *Najjar*, 227 Mass. 450.)

No. 53.

Libel; Cruel and Abusive Treatment and Neglect to Provide.

To the Honorable the Justices of the Superior Court, to be holden at Boston, within and for the County of Suffolk:

Respectfully libels and represents Mary Norton, of Boston, in said County, that she was lawfully married to Michael Norton, now of Boston, at Boston, on the 23rd day of January, A. D. 1910, and thereafterwards your Libellant and the said Michael Norton lived together as husband and wife in this Commonwealth, to wit: at Boston, Massachusetts; that your Libellant has always been faithful to her marriage vows and obligations, but the said Michael Norton, being wholly regardless of the same at Boston, on or about the second day of October, A. D. 1911, and on divers other days and times did inflict cruel and abusive treatment upon your Libellant; and your Libellant further avers that the said Michael Norton, being of sufficient ability, grossly or wantonly and cruelly refuses and neglect to provide a suitable maintenance for her.

WHEREFORE your Libellant prays that a divorce from the bonds of matrimony may be decreed between your Libellant and the said Michael Norton, and for such other orders and decrees as to your Honors shall seem meet, and as justice may require.

Dated the 13th day of November, A. D. 1913.

her

MARY X NORTON.

mark

(Taken from *Najjar* v. *Najjar*, 227 Mass. 450.)

No. 54.

Libel; Adultery as Ground; Custody of Children Demanded.

To the Honorable the Justices of the Superior Court, to be holden at Dedham, within and for the County of Norfolk:

Respectfully libels and represents Charles E. Lindsey, of Weymouth, in said County, that he was lawfully married to Gladys E. Lindsey, now of

Weymouth, aforesaid, at Cambridge, in the County of Middlesex, on the first day of January, 1909, and thereafterwards your Libellant and the said Gladys E. Lindsey lived together as husband and wife in this Commonwealth, to, wit, at said Weymouth; that your Libellant has always been faithful to his marriage vows and obligations, but the said Gladys E. Lindsey, being wholly regardless of the same at Boston, in the County of Suffolk, on Friday, the twentieth day of October, A. D. 1916, she committed the crime of adultery with Rollin Dawson, of Brooklyn, New York.

That there have been two children born of said marriage, namely: Walter T. Lindsey, born August 5, 1910, Ruth E. Lindsey, born March 6, 1914.

Wherefore your Libellant prays that a divorce from the bonds of matrimony may be decreed between your Libellant and the said Gladys E. Lindsey, and that the care and custody of said minor children be committed to the libellant, and for such other orders and decrees as to your Honors shall seem meet and as justice may require.

Dated the twenty-first day of October, A. D. 1916.

CHARLES E. LINDSEY.

(Taken from *Leavitt v. Leavitt*, 229 Mass. 196.)

No. 55.

Libel; Cruel and Abusive Treatment; Prayer for Alimony and Attachment of Property by Trustee Process.

TO THE HONORABLE THE JUSTICES OF THE SUPERIOR COURT, next to be holden at Boston, within and for the County of Suffolk:

RESPECTFULLY libels and represents Virginia Arnold, of Brookline, in the County of Norfolk, that she was lawfully married to George R. Arnold, now of Boston, Massachusetts, at Centre Harbor, New Hampshire, on the sixth day of October, A. D. 1910, and thereafterwards your libellant and the said George R. Arnold lived together as husband and wife in this Commonwealth, to wit: at 222 Bradley Street, Brookline; that your libellant has always been faithful to her marriage vows and obligations, but the said George R. Arnold, being wholly regardless of the same, at Brookline, between the dates of January first, 1916, and December first, 1916, was guilty of cruel and abusive treatment of said Virginia Arnold.

WHEREFORE, your Libellant prays that a divorce from the bonds of matrimony may be decreed between your Libellant and the said George R. Arnold, and prays that alimony may be allowed her, as to the Court seems just and reasonable, and that the real and personal estate of the said George R. Arnold may be attached to the value of Four Hundred Thousand Dollars in order to secure a suitable support and maintenance to your Libellant and to such children as may be committed to her care and custody, and that whereas your Libellant says that the said George R. Arnold

has not in his own hands and possession goods and estate to the value of $400,000, which can come at to be attached, but there is entrusted in and deposited in the hands and possession of the Old Colony Trust Company, a Massachusetts corporation duly organized by law, and the United States Trust Company, a Massachusetts corporation duly organized by law, George E. Steele, of Boston, as he is trustee and executor under the will of George W. Arnold and as he is executor under the will of Flora G. Arnold, Abram C. Rollins, of said Boston, as he is executor and trustee under the will of George W. Arnold, and George R. Arnold, of Boston, as he is executor under the will of Flora G. Arnold, goods, effects and credits of the Libellee to said value, the said supposed trustees may be summoned to appear before the justices of said court to show cause, if any they have, why execution to be issued upon such order as such court shall make in this action, should not issue against the goods, effects or credits in the hands and possession of said trustees;

And your Libellant further prays that the Court will award to your Libellant the care and custody of her minor child, Virginia Arnold.

Dated the 26th day of October, A. D. 1917.

VIRGINIA G. ARNOLD.

(Taken from *Armstrong* v. *Armstrong*, 229 Mass. 592.)

No. 56.

Libel; Adultery as Ground; Prayer for Attachment of Property by Trustee Process.

To the Honorable the Justices of the Superior Court, within and for the County of Middlesex:

Respectfully libels and represents Jennie Evelyn Cashman, of Newton, in said County, that she was lawfully married to Lewis N. Cashman, now of Newton, at Seattle, in the State of Washington, on the twenty-seventh day of May, A. D. 1891, and thereafterwards your Libellant and the said Lewis N. Cashman lived together as husband and wife in this Commonwealth, to wit: at Dedham, County of Norfolk, at Lawrence and Lynn, County of Essex, and at Newton aforesaid; that no children have been born of this marriage; that your Libellant has always been faithful to her marriage vows and obligations, but the said Lewis N. Cashman, being wholly regardless of the same, at Newton and Somerville, County of Middlesex, at Boston, County of Suffolk, and at Hubbardston, County of Worcester, on or about the first day of January, A. D. 1902, and at divers other places and other times between said date and the date of this libel, committed the crime of adultery with one Winifred Blackwell, at one time of said Somerville and now of said Hubbardston, and with divers other persons to your libellant unknown.

Wherefore, your Libellant prays that a divorce from the bonds of matri-

mony may be decreed between your Libellant and the said Lewis N. Cashman, and that the real and personal estate of the said Lewis N. Cashman may be attached to the value of seventy-five thousand dollars in order to secure a suitable support and maintenance to your Libellant as follows, viz., the real estate of the said Lewis N. Cashman in Worcester and Middlesex Counties, Commonwealth of Massachusetts, standing in his own name and in the name of Clara M. Cashman, or C. M. Cashman; the personal estate of the said Lewis N. Cashman standing in his own name and in the name of "L. N. Cashman & Co." and "The Cashman Press," under which names the said Lewis N. Cashman does business; the personal estate of the said Lewis N. Cashman, whether standing in his own name or in his name as trustee for C. M. Cashman, or as trustee for F. P. Cashman, or as trustee for some other person in the possession of the following named corporations, said corporations being each of them duly incorporated under the laws of Massachusetts, and having a usual place of business in the said Commonwealth of Massachusetts in the places named, viz., The Bay State Savings Bank, having a usual place of business in Worcester, Mass., etc. (naming various banks as trustees).

Dated the eighteenth day of June, A. D. 1904.

JENNIE E. CASHMAN.

Filed June 21, 1904.

Attachment ordered as prayed for.

No. 57.

Libel; Adultery as Ground.

To the Honorable the Justices of the Superior Court within and for the County of Essex:

Respectfully libels and represents Horace N. Newell, of West Newbury, in said county, that he was lawfully married to Ethel L. Newell, now of Boston, in our County of Suffolk, at Georgetown, in said County of Essex, on the 24th day of April, A. D. 1901, and thereafterwards your Libellant and the said Ethel L. Newell lived together as husband and wife in this Commonwealth, to wit, at said West Newbury; that your Libellant has always been faithful to his marriage vows and obligations, but the said Ethel L. Newell, being wholly regardless of the same, at Boston, on or about the 20th day of August, 1904, and on divers other days, places and times between her marriage with the Libellant and the date of this libel, committed the crime of adultery with one William G. Dudley, of Newburyport, in said County of Essex.

Wherefore, your Libellant prays that a divorce from the bonds of matrimony may be decreed between your Libellant and the said Ethel L. Newell.

Dated this sixteenth day of November, A. D. 1904.

HORACE N. NEWELL.

No. 58.

Libel; Adultery with Persons Unknown; Custody of Children.

To the Honorable the Justices of the Superior Court next to be holden at Boston, within and for the County of Suffolk:

Respectfully libels and represents Carrie Edna Curry, of Boston, in said county, that she was lawfully married to Frederick H. Curry, now of Poughkeepsie, in the State of New York, at Boston, the first day of June, A. D. 1898, and thereafterwards your Libellant and the said Frederick H. Curry lived together as husband and wife in this Commonwealth, to wit: at Belmont, n the County of Middlesex, and that two children, to wit, Earl V. Curry, six years old, and Mildred Curry, three years old, have been born of said marriage; that your Libellant has always been faithful to her marriage vows and obligations, but the said Frederick H. Curry, being wholly regardless of the same at divers times and places since the said date of their marriage up to December, 1904, committed the crime of adultery with persons to your Libellant unknown.

Wherefore, your Libellant prays that a divorce from the bonds of matrimony may be decreed between your Libellant and the said Frederick H. Curry, and that the care and custody of said children be committed to her, and that in order to secure a suitable support and maintenance to your Libellant and such children as may be committed to her care and custody, said libellee be ordered to pay over to her such sums of money as the Court may deem proper, and that he be ordered to pay over to her a suitable sum in order to enable her to maintain her libel.

Dated the eighth day of June, A. D. 1905.

CARRIE EDNA CURRY.

No. 59.

Libel; Desertion as Ground.

To the Honorable the Justices of the Superior Court:

Respectfully shows Francis X. Leighten, of St. Lambert, in the County of Chambly and Province of Quebec, that he was lawfully married to Mary H. Leighten, before marriage Mary H. Mahoney, of Milford, in the County of Worcester and Commonwealth of Massachusetts, at said Milford, on October 30, A. D. 1901; that they have since lived together as husband and wife in Boston, in the County of Suffolk, and in Cambridge, in the County of Middlesex, both in said Commonwealth; that your Libellant has always been faithful to her marriage vows and obligations, yet the said Mary H. Leighten, being wholly regardless of the same at said Milford, in the month of March, A. D. 1906, utterly deserted him and has continued such desertion from

that time to the date hereof, being more than three consecutive years next prior to the filing of this libel.

Wherefore, your Libellant prays that a divorce from the bond of matrimony may be decreed between your Libellant and the said Mary H. Leighton, and for such further orders and decrees in the premises as to law and justice may appertain.

Dated this tenth day of February, A. D. 1911.

FRANCIS X. LEIGHTON.

No. 60.

Plea to the Jurisdiction.

Now comes the defendant, and, relying on the special appearance filed in his behalf, and without waiving the same and without submitting himself in any way to the jurisdiction of this court, says that the court has no jurisdiction of him in the matter of the said libel for divorce.

Wherefore, said libel should be dismissed as against him.

FREDERICK H. CURRY.

(Taken from *Clark* v. *Clark*, 191 Mass. 128.)

No. 61.

Answer Admitting Marriage and Denying Other Allegations.

Now comes the libellee, and, admitting the allegation of marriage, denies each and every allegation in the libel contained.

MARY H. LEIGHTON.

No. 62.

Answer; Desertion Set Up in Recrimination.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS. SUPERIOR COURT.
DIVORCE SESSION.

Jennie E. Cashman,

against

Lewis N. Cashman.

Now comes the Libellee in the above entitled action and for answer denies each and every item, allegation and particular contained in the libel filed therein.

And for further answer the Libellee says that prior to the date of the alleged events set forth in said libel the Libellant had utterly deserted him, and that said desertion had continued for more than three consecutive years next prior to the filing of said libel.

LEWIS N. CASHMAN.

(Taken from *Cushman* v. *Cushman*, 194 Mass. 38.)

No. 63.

Answer; Connivance Pleaded.

Now comes the Libellee in the above entitled action and admits that she was married to the Libellant at Cambridge on January 1, 1909; that she and the Libellant afterwards lived together at Weymouth in this Commonwealth; that two children were born of said marriage.

And further answering the Libellee denies that she committed the crime of adultery with Rollin Dawson on October 20, 1916, or at any other time.

And further answering the Libellee says that if it shall appear that she and the said Rollin Dawson were together on October 20, 1916, under circumstances from which it might be inferred that she had committed adultery with the said Rollin Dawson, that she was with said Dawson by reason of the connivance and procurement of the Libellant.

And further answering the Libellee says that the Libellant entered into a conspiracy with the said Dawson and others to so arrange matters that she and the said Dawson might be found together under such compromising circumstances as to entitle the Libellant to obtain a divorce from her on the ground of adultery; that in pursuance of said conspiracy the said Dawson, by the procurement of the Libellant, induced the Libellee to go with him to a room in the Hotel Essex in Boston on or about October 20, 1916, where she was found by her husband and others who were parties to said conspiracy.

And further answering the Libellee denies that anything improper took place between her and the said Dawson, as alleged in said libel.

WHEREFORE she prays that said libel be dismissed.

GLADYS E. LINDSEY.

(Taken from *Leavitt* v. *Leavitt*, 229 Mass. 196.)

No. 64.

Answer; Condonation, Connivance and Recrimination Pleaded.

The libellee admits that the libellant was lawfully married to her at Georgetown in said County on the 24th day of April, A. D. 1901, and that thereafter, to wit, from that date until the 5th day of November, 1904,

the libellant and libellee lived together as husband and wife at West Newbury in said County.

Further answering said libel the libellee denies each and every allegation therein contained, excepting those which are herein expressly admitted.

Further answering the libellee says that if she committed all or any of the acts of adultery alleged in said libel, which she denies, that after the times mentioned in said libel and before the commencement of this suit the libellant being fully informed as to all or any of said alleged acts freely condoned the same and forgave the libellee therefor and freely cohabited with her, and that ever since as well as before the dates of said alleged acts the libellee has been a faithful wife to the libellant.

Further answering the libellee says that if she committed all or any of the acts of adultery alleged in said libel, which she denies, or that if anything occurred between her and the said William G. Dudley which might appear to lead to the inference that she had committed any act of adultery with said Dudley, the same was caused, procured and connived at by the libellant, and the said libellee and the said Dudley were brought together by the libellant for the purpose of getting them into such a situation as would lead to an inference that said Dudley had committed adultery with her, and for the purpose of causing said Dudley and the libellee to commit adultery.

And further answering, the libellee says that the libellant at divers times between the date of said marriage and the filing of the said libel committed the crime of adultery with divers other persons whose names are unknown to the libellee.

And further answering, the libellee says that from time to time and at various times since she was married to the libellant as aforesaid, the libellant compelled her to associate with immoral and lewd persons.

WHEREFORE she says that the prayer of the libel should not be granted.

ETHEL L. NEWELL.

(Taken from *Noyes* v. *Noyes*, 194 Mass. 20.)

No. 65.

Affidavit on Default.

(Title.)

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

H. B., being duly sworn, deposes and says:

That he is an attorney and counsellor at law and a member of the firm of D. B. & E. with an office at 52 Wall Street, New York City, and is and has been in charge of the above entitled action; that the summons and complaint herein were duly personally served upon the defendant within the State of New York on the 2nd day of December, 1919, as appears by the affidavit of

B. C. hereto annexed, and that more than 20 days have elapsed since such service; that the last day for defendant to appear, plead or move herein was December 22, 1919; that the defendant has not appeared nor answered nor demurred herein, and the time for her to make her appearance or plead has not been extended by stipulation or by order of the court or otherwise and that defendant is now in default; that the defendant is not in the military service of the United States as appears by the affidavit of ..... veriffed the ..... of ....., 19.., and that this affidavit is made in order to place the above entitled action on the undefended divorce calendar of this court.

Sworn to before me, this 29th day of December, 1919.

No. 66.

Decision on Default.

At a Special Term of the Supreme Court, State of New York, held in and for the Third Judicial District at the County Court House in the City of Albany, Albany County, N. Y., on the 14th day of January, 1921.

Present: HON. JOSEPH ROSCH,
Justice Presiding.

A. B.,
Plaintiff,
against
C. B.,
Defendant.

(Recitals as in Form No. 67.)

FINDINGS OF FACT.

I. That the plaintiff and the defendant were married at the City of Albany, N. Y., on the 28th day of September, 1901, by the Rev. John Smith.

II. That the plaintiff and defendant have ever since their marriage been and now are actual residents and inhabitants of this State.

III. That on the 21st day of April, 1918, the defendant herein committed adultery with one X. Y., at ..... Street, Borough of Manhattan, State of New York.

IV. The said act of adultery was committed without the consent, connivance, privity or procurement of the plaintiff.

V. That the plaintiff has not voluntarily cohabited with the defendant since the discovery of said act of adultery.

VI. That five years have not elapsed since the discovery of said act of adultery by plaintiff.

VII. That the plaintiff has not forgiven or condoned said act of adultery.

VIII. That no decree of divorce has been granted against either plaintiff or defendant in any of the Courts of any states or territories of the United States or of any foreign country, and that no action for divorce has ever been brought by either of the parties against the other.

IX. That the defendant, C. B., is employed by X. Y. Z., stockbrokers, at ..... Street in the Borough of Manhattan, State of New York, as manager at a salary of five thousand dollars ($5,000) per year, payable in equal monthly installments, which is his only source of income.

X. That the plaintiff has been for about one year last past supported by her father and that she has no income or other means of support.

XI. That the issue of said marriage is one child, D. B., who was born on the 28th day of October, 1916, and who is now in the custody of the plaintiff and is being supported by plaintiff's father.

CONCLUSIONS OF LAW.

I. That the plaintiff is entitled to final judgment, unless the court shall otherwise order in the meantime, three months after the filing of the decision herein and the entry of interlocutory judgment, dissolving the marriage between the plaintiff, A. B. and the defendant C. B., which was solemnized on the 28th day of September, 1901, and divorcing the parties on the ground of the defendant's adultery, and permitting the plaintiff to re-marry, but forbidding the defendant to re-marry any other person during the life-time of the plaintiff except with the permission of the court; *and, unless otherwise ordered in the meantime, the plaintiff is hereby required to enter final judgment.*

II. That the custody of D. B., the issue of said marriage, should be awarded to the plaintiff until and after final judgment;

III. That the defendant, C. B., pay the plaintiff, A. B., the sum of thirty-five dollars ($35) per month, payable at her residence in the City of Albany, N. Y., for the support of herself and child, until and after final judgment;

IV. That the plaintiff be awarded costs to be taxed but judgment for the same shall not be enforcible by execution or punishment until final judgment herein.

ENTER:

JOSEPH ROSCH,
Justice Supreme Court.

NOTE.— Portion in italics to be inserted where court requires entry of final judgment.

No. 67.

Interlocutory Judgment on Default.

At a Special Term of the Supreme Court, State of New York, held in and for the Third Judicial District at the County Court House in the City of Albany, Albany County, N. Y., on the 14th day of February, 1920.

Present: Hon. HAROLD J. HINMAN,
Justice Presiding.

A. B.,
Plaintiff,
against
C. B.,
Defendant.

This matter having been brought on for hearing at a Special Term of this Court, held on the 14th day of February, 1920, at the County Court House in the City of Albany, Albany County, New York, and on reading and filing the summons and verified complaint and the affidavit of J. D., verified ..... day of ....., 1920, from which it appears that the summons and complaint were duly and personally served upon the defendant within the state on the ..... day of ....., 1920, (and that there was written upon the face of the copy of the summons delivered to the defendant the inscription "Action for a Divorce"); and on reading and filing the affidavit of J. D., verified the ..... day of ....., 1920, from which it appears that the defendant is not in the military service of the United States as defined by Act of Congress, approved March 8, 1918; and on reading and filing the affidavit of J. D., verified the ..... day of ....., 1920, from which it appears that more than twenty days have elapsed since the service upon the defendant of the summons and complaint herein, and that the defendant has failed to appear or plead herein, but has made default in appearing and pleading although the time so to do has heretofore fully expired, and has not been extended by stipulation by order of this Court or otherwise; and it further appearing that the defendant is of full age; and after hearing the allegations and proofs of the plaintiff and the Court having, after due deliberation, duly made its decision in writing;

NOW, ON MOTION OF X. Y., attorney for the plaintiff, it is

ORDERED, ADJUDGED AND DECREED that the plaintiff have final judgment, unless the Court shall otherwise order in the meantime, three months after the filing of the decision herein and the entry of this interlocutory judgment, dissolving the marriage solemnized between the plaintiff, A. B., and the defendant, C. B., on the 28th day of October, 1901, and divorcing the parties on the ground of the defendant's adultery and permitting the plaintiff to re-marry, but forbidding the defendant to re-marry any other person during the life-time of the plaintiff except with the permission of the Court; and it is further

ORDERED, ADJUDGED AND DECREED that the custody of D. B., the issue of said marriage, be and the same is hereby awarded to the plaintiff until and after final judgment, and it is further

ORDERED, ADJUDGED AND DECREED that the defendant, C. B., pay to the plaintiff, A. B., the sum of thirty-five dollars ($35) per month payable at her residence at the City of Albany, N. Y., for the support of herself and child until and after final judgment herein; and it is further

ORDERED, ADJUDGED AND DECREED that this judgment is interlocutory only; and it is further

ORDERED, ADJUDGED AND DECREED that three months after the entry of this interlocutory judgment and the decision herein this interlocutory judgment shall become the final judgment herein, as of course, unless for sufficient cause the Court in the meantime shall have otherwise ordered,

(*ORDERED, ADJUDGED AND DECREED that final judgment shall not be entered in this action until after the expiration of three months from the entry and filing of the decision and this interlocutory judgment, and that within thirty days after the expiration of said three months final judgment shall be entered upon said decision and interlocutory judgment unless otherwise ordered by the Court*); and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff recover of the defendant costs in the sum of ..... dollars ($.....) as taxed, but judgment for same shall not be enforcible by execution or punishment until final judgment herein.

ENTER:

HAROLD J. HINMAN,
Justice Supreme Court.

No. 68.

Final Judgment of Divorce.

(See Forms No. 35 and No. 67.)

No. 69.

Petition to Vacate Decree on Ground that Decree Obtained by Fraud.

Respectfully represents Joseph H. Ball that heretofore on June 26, 1913, after a hearing on the same, it was decreed that the libel for divorce filed by your petitioner against his wife, Florence M. Ball, should be dismissed and that said libel was dismissed.

And your petitioner says that the said decree dismissing his said libel was obtained by fraud and deceit practised upon this court and by the giving of false testimony as hereinafter set forth, and that by reason of the situation in the course of the said trial caused by the said false testimony and by reason of the manner in which the said cause was tried by the then counsel for your petitioner, your petitioner was deprived of a full and just hearing upon the said cause upon matters which would have constituted a good defence to the fraudulent attacks made upon him by means of said false testimony.

And your petitioner says that William J. Potter of Chelsea, in the County of Suffolk, testified at said hearing that on Sunday, March 30, 1913, at or about 1:10 or 1:15 in the morning, he saw your petitioner and a certain Blanche Stetson in a room on the first floor of the house at 717 Hillside Street in said Chelsea; that he saw them by standing on a bulkhead and looking through a curtain; that your petitioner and said Blanche Stetson were at that time only partly dressed; that after he had been looking four or five minutes the light in the room went out.

And your petitioner says that said Potter did not see the things which he testified he did see, as hereinbefore set out, but that the said testimony of said Potter as hereinbefore set out was false.

And your petitioner says that at the hearing hereinbefore referred to Robert C. Randall of said Chelsea testified that on March 31, 1913, at about quarter past five in the morning he saw your petitioner leaving the premises at 717 Hillside Street in said Chelsea and saw your petitioner take a car to Boston at about 5:30 in the morning on the same day.

And your petitioner says that said Randall did not see the things he testified he saw, as hereinbefore set out, but that the said testimony of said Randall was false.

And your petitioner says that Jessie B. Brown testified at the hearing hereinbefore referred to that on March 25, 1913, at about 12:30 in the morning she, being in the house at 414 Hillside Street in said Chelsea, saw your petitioner enter said house and go into the room where Blanche Stetson was.

And your petitioner says that said Brown did not see the things she testified she saw, as hereinbefore set forth, but that her testimony in those respects was false.

Wherefore your petitioner prays that the said decree of June 26, 1913, whereby his libel was dismissed may be set aside and that a new hearing on said libel may be granted.

(Taken from *Boyd* v. *Boyd*, 226 Mass. 542.)

V. SEPARATION FROM BED AND BOARD.

No. 70.

Complaint for Separation on Ground of Abandonment.

(Title of action.)

The complaint of the plaintiff herein respectfully shows to this court:

I. (*Allegation as to marriage as in Form No.* 71.)

II. (*Allegation as to residence of parties, as required by section* 1763 *of the Code, as in Form No.* 71.)

III. That, although the said plaintiff has always conducted himself toward the defendant as a faithful and loving husband, the said defendant disregarded her duties as a wife and on the ..... day of ....., 19.., at which time the said plaintiff was seventy years old and in feeble condition of health and entirely alone, and without just cause or provocation, abandoned plaintiff and left and has been ever since wilfully absent from the said plaintiff's bed and board, although the said plaintiff has repeatedly requested the said defendant to return.

IV. That the issue of said marriage of the plaintiff and defendant are (*state names and dates of birth of children, and also allege as to the unfitness of defendant to have the care and custody of such children, if they are minors*).

Wherefore, the plaintiff demands judgment that a decree of separation may be made by this court ordering, directing and decreeing that said plaintiff and defendant live separate and apart forever (*and where the children are minors ask judgment for their care and custody*), besides the costs of this action, and such other and further relief as to this court may seem just and proper.

DAVID BENNETT,
Attorney for Plaintiff.

Office and P. O. Address, ... Street, Albany, N. Y.

(Verification.)

No. 71.

Complaint for Separation on Ground of Cruelty.

(Title of action.)

The complaint of the plaintiff herein respectfully shows to this court:

I. That on the ..... day of ....., 19.., at ....., in the County of ....., and State of New York, the said plaintiff was married to the defendant.

II. That, at the time this action was commenced, the said plaintiff and defendant were and still are residents of this State. (*Or state such other jurisdictional facts as are required by section* 1763 *of the Code.*)

III. That since the said marriage the defendant has treated the plaintiff in a cruel and inhuman manner, and his conduct has been such as to render it improper and unsafe for her to cohabit with him, and, since the year ....., he has repeatedly committed acts of violence upon the plaintiff and her children, in particular, as follows:

1. On or about the ..... day of ....., 19.., at ....., and also at her place of residence in the said city of ....., the defendant, without cause or provocation, falsely accused the plaintiff of soliciting the attention of men in an improper, lascivious and unchaste manner.

2 That on or about the ..... day of ....., 19.., the defendant, without cause or provocation, falsely accused the plaintiff of carnal intimacy with one ....., who is a relative of the plaintiff.

3. That on or about the ..... day of ....., 19.., at the City of ..... aforesaid, the defendant, without cause or provocation, violently assaulted the plaintiff and threatened to kill her.

4 (*Specify particularly, in successive paragraphs, the nature and circumstances of the defendant's misconduct, and set forth the time and place of each act complained of with reasonable certainty.*)

IV That since the marriage of the parties hereto, the plaintiff has given birth to the following children, who are now living with the plaintiff and who are the issue of said marriage, viz.: Julia B., a daughter, born on the ..... day of ....., 19..; Clarence B., a son, born on the ..... day of ....., 19.., and Benjamin H. B., a son, born on the ..... day of ....., 19..; that the defendant herein is an unfit and improper person to have the care, custody, training and education of such children.

V That as the plaintiff is informed and believes, the defendant is seized and possessed of real estate in the City of ....., County of ..... State of ....., of the value of ..... dollars, and that he is possessed and is the owner of personal property at said city of the value of ..... dollars; that the plaintiff has

no means for her support and maintenance, but she and her children are now being supported by her father, with whom she resides.

Wherefore, the plaintiff demands judgment for a separation from the bed and board of the defendant, and that the custody of said children be awarded to the plaintiff and that a reasonable provision for the support of the plaintiff and her children and for the training and education of said children be made out of the property of the said defendant, and for the costs of this action and such other and further relief as to the court may seem just and proper.

DAVID BENNETT,
Attorney for the Plaintiff.

Office and P. O. Address, ... Street, Albany, N. Y.

(Verification.)

No. 72.

Decision in Action for Separation.

At a Trial Term of the Supreme Court, State of New York, held in and for the Third Judicial District at the Albany County Court House, in the City of Albany, Albany County, N. Y., on the 20th day of January, 1921.

Present: Hon. JOSEPH ROSCH,
Justice Presiding.

A. B.,
Plaintiff,
against
C. D.,
Defendant.

The above-entitled action, having been duly brought on for trial at a Trial Term of the Supreme Court for the State of New York on the 20th day of January, 1921, before Mr. Justice Rosch, without a jury, and it appearing that the original issues herein were those made by the complaint of the plaintiff asking for an absolute divorce against the defendant, and the answer of the defendant in denial of the complaint, and by the counterclaim contained in defendant's said answer asking for a judgment of separation from bed and board against the plaintiff, and the plaintiff's reply in denial to such counterclaim, and the plaintiff having discontinued his action against the defendant, and the issues raised by defendant's

counterclaim for separation having been tried by the Court on said January 20, 1921, and due proof of the facts and circumstances set forth in the said counterclaim having been made and due deliberation having been had, I do find and decide as follows:

FINDINGS OF FACT.

First. That the plaintiff and defendant were, at the commencement of this action, both residents of the State of New York.

Second. That the parties hereto were married and became husband and wife in the City of New York on or about July 7, 1915.

Third. That there is no issue of such marriage.

Fourth. That the plaintiff has, from the time of said marriage, neglected and refused to provide for the defendant and abandoned her.

Fifth. That the circumstances of the parties are such that defendant should have the sum of $12 per week paid to her by plaintiff as and for permanent alimony for her support and maintenance.

CONCLUSIONS OF LAW.

First. That defendant is entitled to a decree dismissing the plaintiff's complaint and separating the parties hereto from bed and board with a provision therein that plaintiff pay to defendant $12 per week as and for permanent alimony for her support.

Second. That defendant have taxable costs of this action.

ENTER:

JOSEPH ROSCH,
J. S. C.

No. 73.

Judgment in Action for Separatio

(Title of action and caption.)

This action having been commenced by the due and personal service of the summons and complaint herein on the defendant within the State of New York on the ..... day of ....., 19.., and the defendant having appeared and answered herein by her attorney, and this cause having duly come on for trial before this court and this court having heard all the evidence adduced by the plaintiff and defendant herein and having duly made and filed its decision herein, wherein and whereby it finds that all the material allegations of the complaint herein have been established and that the plaintiff herein is entitled to judgment as prayed for in the complaint,

Now, after hearing ....., attorney for the defendant, in opposition thereto, on motion of ....., attorney for the plaintiff, it is hereby

Ordered and adjudged that the said plaintiff and defendant be and hereby are separated from bed and board forever; it is hereby further

Ordered and adjudged that the plaintiff have the care, custody and control of the children born of the marriage of such plaintiff and defendant, to-wit: (*state names and ages of children*); and that the defendant be permitted to visit and see such children at (*state times, places and under what conditions the children may be seen and visited by the defendant*); it is hereby further

Ordered and adjudged that during the joint lives of the plaintiff and defendant herein the said defendant pay to the plaintiff herein the sum of ..... dollars, weekly (*or monthly*), for her support and maintenance, which sum is to be paid (*state time and place of payment*); it is hereby further

Ordered and adjudged that the plaintiff herein have and recover from the defendant herein her costs and disbursements in this action, to be taxed.

ENTER:

JOSEPH ROSCH.
Justice Supreme Court.

VI. ALIMONY AND COUNSEL FEES

No. 74.

Petition for Alimony Filed After Divorce Granted; Denied on Account of Second Wife.

RESPECTFULLY REPRESENTS Elizabeth W. Berry, of Lexington, in the County of Middlesex and Commonwealth of Massachusetts, Petitioner, that she was formerly the wife of Maybin W. Berry, now of Cambridge, in said County, Respondent, and was divorced from the bonds of matrimony on the twelfth day of May, 1911, by this Court at a sitting held at Boston, within and for the County of Suffolk;

THAT subsequent to the entering of a decree *nisi* in said divorce proceedings and before said decree became absolute, viz., on or about the 23d day of May, 1911, the said respondent undertook, by a promise made in writing to the said petitioner, to pay said petitioner nine dollars ($9.00) a week for the remainder of her life or until she should remarry, and under and in consequence of said promise said respondent has made regular payments to said petitioner until within a few weeks last past, when he wholly ceased to continue such payments;

THAT in consequence of said payments under said promise the said petitioner has hitherto never been obliged to apply, nor has, in fact, applied, to this Court for the payment of alimony;

THAT said petitioner is now wholly destitute;

THAT the said Maybin W. Berry has an income of at least $20 a week from one source, and is believed by said petitioner to have one or more other sources of income.

WHEREFORE, your petitioner prays that the said Maybin W. Berry may, by an order of this Court, be required to pay to your petitioner a reasonable sum for her support and maintenance during her life or until the further order of this Court, and such sums as may be necessary or proper for her to defray the costs and expenses of this suit, by way of counsel fees or otherwise, and for such other and further order as may be just.

ELIZABETH WEBSTER BERRY,
Petitioner.

Filed March 4, 1915.

March 16, 1915, after hearing, petition denied.

MEMORANDUM.

THE COURT. I find as a fact in this case that the Respondent is not receiving as much as he needs to support himself and pay a part of the necessities of life for himself and his second wife, and I, therefore, find for the Respondent and order the petition dismissed.

March 16, 1915. HUGO A. DENNISON,
Justice Supreme Court.

(Taken from *Brown* v. *Brown*, 222 Mass. 415.)

No. 75.

Bill in Equity to Enforce Foreign Decree for Alimony.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT.

FRANKLIN, SS. In Equity. July 23, 1918.

Anna G. Wilson, of Newark, in the County of Passaic, and State of New Jersey, Plaintiff,

against

J. Louis Wilson, of Greenfield, in the County of Franklin and said Commonwealth, Defendant.

PLAINTIFF'S BILL.

Now comes the plaintiff in the above-entitled action and says:

1. That she is the wife of the defendant.

2. That by decree entered in chancery in the State of New Jersey, certified copy of which is hereeto annexed marked "A," the defendant was ordered

to pay to the plaintiff certain sums of money therein specified, and has failed to make payment in accordance with said decree.

3. That on the thirty-first day of May, 1918, execution issued on said decree, copy of which execution is hereto annexed marked "B," and the plaintiff says that said judgment by said decree is in full force and has not been reversed, annulled or satisfied in whole or in part.

4. That the defendant has removed from the State of New Jersey to the Commonwealth of Massachusetts so that said execution cannot be levied upon his body, and that the defendant has no goods or estate in the State of New Jersey known to the plaintiff on which said execution can be levied or satisfied.

WHEREFORE, the plaintiff prays that the decree hereto annexed, marked "A," and the execution issued thereon be given effect in this Commonwealth, and that judgment be entered for the plaintiff for the amount due on said execution, with the costs of said execution; and that a decree be entered authorizing execution to issue in this Commonwealth for the amount due on said execution hereto annexed, marked "B," with interest from May 31, 1918, to date of such decree, and with costs on said execution amounting to Eleven Dollars and Seventy-six Cents;

And for such further and other orders and decrees in the premises as the Court may deem necessary or proper.

ANNA G. WILSON,

By WM. A. DANA, HORACE W. NEWTON, Her Attorneys.

COMMONWEALTH OF MASSACHUSETTS.

FRANKLIN, SS. July 23, 1918.

Personally appeared William A. Dana, one of the attorneys for the above-named plaintiff, and on behalf of the plaintiff made oath that the above statement by him subscribed so far as it is made on knowledge is true, and so far as it is made on information and belief is true to the best of his knowledge and belief, before me,

CHARLES FOSTER,
Notary Public.
(Notarial seal.)

My commission expires September 9, 1923.

"A"

IN CHANCERY OF NEW JERSEY.

Between

Anna G. Wilson, Complainant,
and
J. Louis Wilson, Defendant.

ON BILL, ETC.
ORDER.

This cause, coming on to be heard in the presence of Hall and Daley, Solicitors, for and of counsel with the complainant, and in the presence of

Ralph E. Lewis, Esquire, Solicitor, for and of counsel with the defendant, Whereupon, and upon reading the bill of complaint, proofs and report of Hugh B. Rice, Esquire, one of the Special Masters of this Court to whom by previous order made in this cause it was referred to take depositions and other evidence, and to report, together with his opinion thereon, on the matter of alimony herein; from which and from the other proof produced it now appears to the satisfaction of the Chancellor that the complainant, Anna G. Wilson, and the defendant, J. Louis Wilson, were lawfully married on or about October 25, 1899; and that the defendant, without any justifiable cause, abandons the complainant and separates himself from her and refuses and neglects to maintain and provide for her; and that the defendant was personally served with process in this State;

It is thereupon, on this sixteenth day of February, 1918, by his Honor, Edwin Robert Wallace, Chancellor of the State of New Jersey,

Ordered, adjudged and decreed that the defendant, J. Louis Wilson, do pay to the complainant, Anna G. Wilson, or to her Solicitors, the sum of Ten dollars per week from and after the date of the filing of the bill of complaint in this cause for and towards the support and maintenance of the complainant and her infant child, J. Louis Wilson, Jr., who is now in the custody of the complainant, and that the sums heretofore paid by the defendant for and towards the support of the complainant and her said infant child, J. Louis Wilson, Jr., under order of the court heretofore made on July 17, 1917, shall be credited upon the payments directed to be made under this order.

And it is further ordered, adjudged and decreed, that a copy of this decree be served forthwith upon the defendant, or his solicitor, and that within ten days after said service, the defendant do give bond to the said complainant in the sum of One thousand dollars, with sufficient surety or sureties, to be approved as to form and security by William A. Loud, Esquire, one of the Special Masters of this Court, for the punctual payments of the alimony and maintenance by this decree awarded to be paid, at the time and in the manner in this decree directed, and upon neglect or refusal of said defendant to give said bond, within the time so specified, or upon his default or that of his surety or sureties to pay the said sum or sums when the same shall fall due according to this decree, that the complainant be at liberty to apply to this Court to award and issue process of sequestration, or for such other process or order, as this Court may, under the circumstances, deem equitable and just, and as may be consistent with the power and authority of this Court.

And it is further ordered, adjudged and decreed, that the said defendant do further pay to the complainant, or her solicitors, the costs of this suit to be taxed, and also the sum of One hundred dollars, which is hereby adjudged and decreed to be a reasonable counsel fee for the counsel of said complainant (in addition to the counsel fee allowed by said order of July

17, 1917, amounting to $100), and that the said complainant do have execution for said costs and counsel fee according to the practice of this Court.

E. R. WALLACE,
C.

Respectfully advised,
FREDERICK W. STEARNS, V. C.

A true copy.
ROBERT H. ADAMS, Clerk.

"B"

NEW JERSEY, SS.

(Seal of the Court of Chancery, State of New Jersey.)

The State of New Jersey to the Sheriff of Our County of Passaic, Greeting:

Whereas, in and by a certain decree made in Our Court of Chancery before our Chancellor, on the 16th day of February, 1918, in a certain cause therein depending wherein

Anna G. Wilson is complainant and J. Louis Wilson is defendant: It is ordered, adjudged and decreed that the complainant is entitled to receive the sum of $10 per week from August 16, 1915, the date of the filing of the bill of complaint in said cause, for the support and maintenance of complainant and her infant child, J. Louis Wilson, Jr., and that she is entitled to receive of the said defendant her costs of this suit to be taxed; and by said decree it was further ordered, adjudged and decreed that a copy of said decree be served upon the defendant, or her solicitor, and that within ten days after said service, the defeendant give bond to the said complainant in the sum of $1,000 with sufficient surety and sureties, to be approved as to form and security by William A. Loud, Esquire, one of the Special Masters of this Court, for the punctual payments of the alimony and maintenance by said decree directed; and upon the neglect or refusal of said defendant to give said bond within the time so specified or upon his default or that of his surety or sureties to pay the said sum or sums when the same should fall due according to said decree that the complainant be at liberty to apply to this Court to award and issue processes of sequestration, or for such other processes or order as this court should, under the circumstances deem equitable and just, and as should be consistent with the power and authority of said Court, and that unless the defendant pay to the complainant or her solicitors her costs of this suit to be taxed that the complainant have execution for said costs according to the practice of this Court; and whereas it appears by affidavit that the said defendant was in arrears on the 23d of May, 1918, for the said alimony and maintenance in the sum of $1,248, and that the costs of said complainant have

been duly taxed at $161.72, and we being satisfied that the said defendant has not complied with the terms of said decree and that demand has been made for said sum of $1,248 for arrears of alimony and maintenance and said sum of $161.72 taxed costs and that a certified copy of said decree and taxed bill of costs has been duly served on the defendant's solicitor;

Therefore, we command you that of the goods and chattels of the said defendant in your County you cause to be made the said sum of $1,248 for arrears of alimony and maintenance and said sum of $161.72 costs, together with the costs of this writ, and if sufficient goods and chattels of the said defendant in your County you cannot find, whereof to make the said sum of $1,248 and costs, together with the costs of this writ, then we further command you that of the lands, tenements, hereditaments and real estate whereof said defendant was seized on the 16th day of February, 1918, or at any time afterwards, in whereseever hands the same may be, you cause to be made the whole or the residue, as the case may require, of the said sum of $1,248, with costs as aforesaid, and the costs of this writ: and that you have those moneys before our Chancellor in our said Court of Chancery, in Trenton, on the 31st day of August, 1918, to render to the said complainant, and also the surplus money, if any there be, to abide the further order of our said Court; and you are to make return at the time and place aforesaid by certificate under your hand, of the manner in which you have executed this writ, together with this writ.

Witness the Honorable Edwin Robert Wallace, our Chancellor, at Trenton, this 31st day of May, in the year 1918.

ROBERT H. ADAMS,
Clerk.

HALL & DALEY,
Solicitors.

No. 76.

Answer to Plaintiff's Bill.

COMMONWEALTH OF MASSACHUSETTS.

Superior Court,
Franklin, ss.
August 1, 1918.

Anna G. Wilson,
against
J. Louis Wilson.

DEFENDANT'S ANSWER TO THE PLAINTIFF'S BILL.

And now comes the defendant in the above entitled case and **without** waiving his demurrer to said bill makes the following answer.

In answer to the first paragraph of the Plaintiff's Bill the defendant neither admits or denies the same but leaves the plaintiff to prove the same.

In answer to the second paragraph of the Plaintiff's Bill the defendant denies the allegations therein contained and requires that the plaintiff prove the same.

In answer to the third paragraph of the Plaintiff's Bill the defendant denies the allegations therein contained and requires that the plaintiff prove the same.

In answer to the fourth paragraph of the Plaintiff's Bill the defendant denies the allegations therein contained and further answering says that no proper or legal service or any service has been made upon him whereby a judgment could be properly entered against him in said Court.

And the defendant further answering says that in the present proceedings the courts of this Commonwealth have no jurisdiction.

J. LOUIS WILSON,
By FRANK J. LITTLE,
His Attorney.

(Taken from *White* v. *White*, 233 Mass. 39.)

No. 77.

Decree Modifying Order as to Support and Custody of Children.

That so much of the original decree relating to the support of the minor children and the necessary medical attention of the children be modified and revised as follows:

That the libellee shall pay to the libellant on the first day of each month the sum of fifty-five (55) dollars, which sum shall be used for the support, maintenance, and providing the necessary medical attention for said minor children.

That part of the original decree relating to visits to the children or visits by the children at the home of the libellee be modified and revised as follows:

That the libellee shall have the privilege to visit the children once a week; and to have Nelson B. Pomeroy visit him for one week once in every three months; and to have Henrietta M. Pomeroy visit at the home of her grandmother or aunt one week in every three months in his absence, or, if such visits are made in his presence, that she be accompanied by her mother, if the mother so desires.

By the Court,
EDWARD E. HOLLAND,
Clerk.

This decree is to take effect as of February 26, 1913, with the modification that a further decree is to be made that the mother is to be allowed to

make the selection of proper medical attendance for the care of said children, which modification is to take effect as of the last Monday of December, 1910.

JOHN H. JEROME,
J. S. C.

(Taken from *Perkins* v. *Perkins*, 225 Mass. 392.)

No. 78.

Proceedings for Separate Support Praying for Protection Against Restraint on Personal Liberty, Separate Support and Attachment of Property.

To the Honorable the Judges of the Probate Court in and for the County of Middlesex:

Respectfully represents Faustina F. Shelley, of Waltham, in the County of Middlesex, that she is the lawful wife of Obed C. Shelley, of said Waltham, that her husband fails, without just cause, to furnish suitable support for her, and has deserted her; and that she is living apart from her said husband for justifiable cause, and she herein sets forth the following specifications: desertion, cruel and abusive treatment, March 30, 1904. Adultery with Mrs. A. F. Gerry on the 12th day of July, 1904, and divers other days and times between said 12th day of July, 1904, and July 19th, 1904, at said Waltham.

Wherefore your petitioner prays that said court will, by its order, prohibit her said husband from imposing any restraint on her personal liberty, and make such order as it deems expedient concerning her support, and that the personal estate of the said Obed C. Shelley in the hands and possession of Alonzo D. White and Hollis E. Dennis, both of said Waltham, may be attached by trustee process to the value of two thousand dollars, in order to secure a suitable support and maintenance to your petitioner.

Dated this twenty-sixth day of November, A. D. 1904.

FAUSTINA F. SHELLEY.

A true copy.

ATTEST: .....

Asst. Register.

Middlesex, ss. Probate Court. March 8, 1905. Ordered that respondent pay to the petitioner to enable her to prosecute her petition the sum of fifty dollars forthwith, and it is further ordered that pending this petition, and until the further order of the court, he pay her on each Wednesday after this day the sum of twenty-five dollars.

GEO. F. LAWRENCE,
Judge of Probate Court.

COMMONWEALTH OF MASSACHUSETTS.

Middlesex, ss.

At a Probate Court holden at Lowell, in and for said County of Middlesex, on the seventeenth day of January, in the year of our Lord one thousand nine hundred and five.

On the petition of Faustina F. Shelley, of Waltham in said County, the wife of Obed C. Shelley, of said Waltham, praying that said Court will by its order, prohibit her said husband from imposing any restraint on her personal liberty, and make such order as it deems expedient concerning her support.

Due notice of said petition having been given to the said Obed C. Shelley, the case was continued for hearing, and now on this twenty-fourth day of June, A. D. 1905, to which time the same was continued;

It appearing to the Court that on March 30, 1904, the said Obed C. Shelley abusively treated the petitioner; that he has deserted her; and that said petitioner for justifiable cause is actually living apart from her said husband;

It is ordered that the temporary order of March 8th, 1905, do now cease; that said husband be and he hereby is prohibited from imposing any restraint on the personal liberty of said petitioner, and that he pay to said petitioner for the support of herself the sum of five hundered and twenty-five dollars forthwith, and the further sum of one hundred and twenty-five dollars on the last Saturday of each month hereafter until the further order of said court.

CHAS. J. MALLOY,
Judge of Probate Court.

A true copy.
ATTEST: F. M. ESTABROOK,
Asst. Register.

Filed July 21, 1905.

(Taken from *Shepherd* v. *Shepherd*, 196 Mass. 179.)

No. 79.

Affidavit; Application for Alimony and Counsel Fees.

(Title of Action.)

STATE OF NEW YORK,
ALBANY COUNTY, } *ss.:*

A. B., being duly sworn, deposes and says:

I. That she is the plaintiff herein and has brought this action against the defendant, her husband, for a limited divorce or judgment of separation between them, upon the ground of cruel and inhuman treatment, and of such conduct, on the part of the defendant, toward the plaintiff, as renders

it unsafe and improper for her to cohabit with him, as more fully appears by the complaint hereto annexed.

II. That this action was commenced by the service upon the defendant on the ..... day of ....., 19.., of a summons and complaint, as appears by the affidavit of X. K., hereto annexed; that she will be able to substantiate all the allegations of the complaint by proof on the trial, and that she has a good cause of action thereon, as she is advised by her counsel, L. M., who resides and has his office at ....., county of ....., State of New York, and as she verily believes.

III. That since said marriage, the defendant has treated the plaintiff in a cruel and inhuman manner, and since the year ..... he has repeatedly committed acts of cruelty and violence upon her and upon her children, as follows, to wit: (*here set forth the facts fully*).

IV. That your deponent is wholly destitute of the means of supporting herself or her children pending this action or of carrying on the same and defraying the costs and expenses thereof.

V. That the defendant herein is seized and possessed of real estate of the value of ..... dollars, and personal property of the value of ..... dollars, as deponent is informed and believes, which is sufficient to enable him to advance therefrom to your petitioner such sums as may be necessary for the above-mentioned purposes; that deponent is informed and believes that the defendant herein is engaged in the mercantile business, at ....., as a dry goods merchant, and that he has or claims to have a large trade or business in connection therewith, and that he has a large annual income therefrom.

VI. That the issue of the marriage of the parties hereto, now living with the plaintiff, is three children, as follows: (*state names, and dates of birth of children*); and the plaintiff alleges that the defendant is an unfit and improper person to have the care, custody, training and education of such children.

Wherefore, deponent asks that the said defendant may, by an order of this court, be required to pay to deponent a reasonable sum for her support and maintenance, and for the support and maintenance of her children during the pendency of this action, and such sums as may be necessary to enable deponent to carry on this action, and to defray the necessary costs and expenses thereof, and for such other and further order as may be just.

Sworn to before me, this .....
day of ....., 19.. }

.....

Notary Public.

[NOTE: Attach affidavits corroborating statements as to cruelty and defendant's earnings, etc.]

No. 80.

Notice of Motion for Alimony and Counsel Fees.

SUPREME COURT, ... COUNTY.

A. B.,
Plaintiff,

against

C. B.,
Defendant.

PLEASE TAKE NOTICE that upon the annexed affidavits of A. B., verified April 25, 1919, and of E. F., verified March 19, 1919, and upon the pleadings herein, a motion will be made at a Special Term of this Court, Part I thereof, for the hearing of motions appointed to be held at the County Court House in the Borough of Brooklyn, City of New York, in said County of Kings, on the 6th day of May, 1919, at the opening of Court on that day or as soon thereafter as counsel can be heard, for an order directing the defendant herein, C. B., to pay the plaintiff the sum of Fifty Dollars ($50) per week for the support and maintenance of herself and the issue of the marriage, during the pendency of this action, and also the sum of Two Hundred Fifty Dollars ($250) counsel fee for her attorney, to enable her to defray the costs and expenses of this action, and for such other or further relief as may be just.

Answering affidavits must be served at least one day before the return day thereof.

Dated New York, April 25, 1919.

W. X.,
Attorney for Plaintiff.

Office and Post Office Address, ... Street, New York City.

To:
Y. Z., Esq.,
Attorney for Defendant.

No. 81.

Order of Reference to Determine Alimony.

(Title of action and caption.)

On reading and filing the affidavit of the plaintiff herein, verified the ..... day of ....., 19.., and upon the affidavits accompanying

the same, with due proof of the service thereof, and upon reading the affidavits of X. Y. and Y. Z., in opposition thereto, and on motion of L. M., of counsel for the plaintiff, and after hearing M. N., of counsel for the defendant, in opposition thereto, it is hereby

ORDERED, That it be referred to D. F., attorney at law, of the city of ....., to inquire what would be a reasonable sum to be allowed to the said plaintiff for her support and maintenance, and for the support maintenance and education of the children of the marriage of plaintiff and defendant and to report the same to the court. And it is hereby further

ORDERED, That such referee make inquiry and report what would be a reasonable sum to be allowed the said plaintiff for the purpose of enabling her to prosecute this action and to defray the necessary costs and expenses thereof; and that such referee report also the time and place and under what conditions the payment of such sums should be made.

ENTER:

JOSEPH ROSCH,
J. S. C.

No. 82.

Report of Referee as to Alimony.

(Title of action.)

To the Supreme Court:

In pursuance of the order of this court, made and entered in the above-entitled action on the ..... day of ....., 19.., by which it was referred to me, to inquire (*here state substance of the order*), I do respectfully report:

That I have been attended by the parties and their counsel, and have heard their proofs and allegations, and after due deliberation thereon I find as matters of fact:

1. That the defendant is seized and possessed of the following real property, to-wit: An appartment house, situated on ..... street, in the city of ....., county of ....., State of ..... (*giving brief description of same*), which is of the value of ..... dollars, and the annual rents and profits of which are ..... dollars.

2. That he is also possessed of ..... shares of stock in the ..... company, of the par value of ..... dollars each, the actual value of which is ..... dollars, and the annual dividends from which for the past ten years have averaged each year the sum of ..... dollars.

(*State and briefly describe as above other property possessed by the defendant.*)

3. That such defendant is engaged in the mercantile business, owning and

conducting a store for the sale of dry goods, at ..... street, in the city of ....., State of ....., the profits of which business during the preceding year were ..... dollars.

4. That the following children were born of the marriage of the plaintiff and the defendant in this action (*state names and dates of birth of children*), and that of such children, the following reside with the plaintiff and are in her care, custody and control.

I also further report that in my opinion the defendant herein should be required to pay to the plaintiff for her support and maintenance, and for the support, maintenance and education of the children residing with her, a sum of ..... dollars per month, during the pendency of this action; and that such sum should be paid to her on the first day of each month from the date of the order directing such payment.

And I also further report that in my opinion the sum of ..... dollars would be a proper sum to be allowed the plaintiff for the purpose of enabling her to prosecute this action and to defray the necessary costs and expenses thereof.

All of which is respectfully submitted.

Dated .....

D. F.,
Referee.

No. 83.

Order Granting Alimony and Counsel Fees.

At a Special Term of the Supreme Court, etc.

(Title of action and caption.)

On reading the summons, complaint and answer in the above-entitled action, and on reading and filing the notice of motion for this order, with proof of the due service thereof on ..... attorneys for the defendant, and the affidavit of the plaintiff, verified on the ..... day of ....., 19.., and the affidavit of L. Y., thereto annexed, in support of the motion and the affidavit of ....., verified the ..... day of ....., 19.., (*state names of persons making affidavits in opposition*), and after hearing L. M., of counsel for the plaintiff in support of the motion, and C. B., of counsel for the defendant in opposition thereto,

On motion of L. M., attorney for the plaintiff, it is hereby

Ordered, That the defendant pay to L. M., attorney for the plaintiff, the sum of ....., counsel fees, within ten days after the service of a certified copy of this order on the attorneys for the defendant; and it is hereby further

Ordered, That the defendant pay to the plaintiff the sum of ..... dollars, per month, for her support and the education and support of the children of the marriage, during the pendency of this action, from the commencement thereof, to-wit: the ..... day of ....., 19..; and make such payments, as follows, to-wit: For the two months ending on the ..... day of ....., 19.., within five days after the service of a certified copy of this order on the attorneys for the defendant, and thereafter on the ..... day of each and every month, beginning on the ..... day of ....., 19..; and it is hereby further

Ordered, That the defendant make each and all payments above ordered at the office of ....., attorney for the plaintiff, at ..... street, city of ....., State of New York, between the hours of ten in the morning and three in the afternoon, and if any of the days so above fixed for payment shall fall on a Sunday or other holiday, then said payment shall be made on the next succeeding secular day.

ENTER:

E. M. C.,
J. S. C.

VII. PARENT AND CHILD; GUARDIAN AND WARD.

No. 84.

Petition for Writ of Habeas Corpus for Detention of Child.

SUPREME COURT — COUNTY OF .....

The People of the State of New York
ex rel. A. B.,
against
J. B., E. B., and P. B.

To the Supreme Court of the State of New York, or to any justice thereof:

The petition of A. B. respectfully shows to the court:

I. That the petitioner is a resident and inhabitant of the State of New York, residing at ....., in the city of ....., in said State; and that he is engaged in the business of ....., in such city.

II. That on the ..... day of ....., 19.., the above-named

petitioner was married to the said J. B., at ....., in the city of ....., State of .....; and that two children were born as the issue of such marriage, to-wit: Anna B., on the ..... day of ....., 19.., and John B., on the ..... day of ....., 19...

III. That the said children, Anna B. and John B., being infants of tender years, are imprisoned and restrained in their liberty by the above-named defendants, J. B., E. B., and P. B., at ....., in the city of .....

IV. That the said infants have not been committed, nor are they detained by virtue of any process, judgment, decree, final order or mandate issued by any court of the United States, or of any judge thereof, nor are they committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such a tribunal made in a special proceeding instituted for any cause except to punish him for contempt; nor by virtue of an execution or other process issued upon such a judgment, decree, or final order, according to the best knowledge and belief of your petitioner.

V. That the said petitioner and his wife, the said J. B., are living in a state of separation without being divorced; and the said E. B. and P. B. (*state relationship of parties, etc.*).

VI. That your petitioner is entitled by law to the absolute and exclusive control of the said children, and that the imprisonment and restraint of such children by the said J. B., E. B., and P. B., is illegal, and that the said children are thereby subjected to unfit, improper, and harmful influences.

VII. (*State particular reasons, in detail, why the children should not remain in the custody of the defendants.*)

VIII. That your petitioner is abundantly able to provide for the support, maintenance, and education of such children. (*State with some certainty the financial condition of the petitioner.*) But that the said J. B. and the defendants E. B. and P. B., are financially unable to properly provide for the support, maintenance and education of such children.

IX. That no previous application has been made by me for a writ of habeas corpus to secure the custody of such children.

Wherefore, your petitioner prays that a writ of habeas corpus issue, directed to J. B., E. B., and P. B., hereinbefore referred to, commanding them to produce my said children, Anna B. and John B., before this court, together with the cause of their imprisonment and detention by them, and that this court make an order herein awarding to me the custody of my said children, and for such other and further relief as to the court may seem just and proper.

And your petitioner will ever pray.

A. B.

(Verification.)

No. 85.

Writ of Habeas Corpus.

The People of the State of New York:

To J. B., E. B., and P. B., residing at ....., in the city of ....., N. Y.

Greeting:

We command you, that you have the body of Anna B., and John B., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name they shall be called or charged, before the Supreme Court, at a Special Term thereof, at ....., in the city of ....., on the ..... day of ....., 19.., at ten o'clock in the forenoon, to do and receive what shall then and there be considered concerning them, and have you then there this writ.

Witness: Hon. Harold J. Hinman, the ..... day of ....., 19...

LUTHER WARNER,
Clerk.

DAVID BENNETT,
Attorney for Plaintiff,
61 State Street, Albany, N. Y.

Indorsement.

The within writ is hereby allowed.

Dated, New York, ... day of ....., 19...

HAROLD J. HINMAN,
J. S. C.

No. 86.

Return to Writ of Habeas Corpus.

(Title.)

To the Supreme Court of the State of New York:

I, J. B., to whom the writ of habeas corpus issued herein is directed, do hereby make return thereto, as follows:

I. I was, as stated in the petition of the above-named A. B., married to the said A. B. on the ..... day of ....., 19..; and the children of such marriage, Anna B. and John B., infants of tender years, to-wit: of the age of five and seven years, respectively, are residing with me at the home of my parents, the above-named E. B. and P. B., at ....., in the city of ....., State of New York.

II. I deny that the petitioner is entitled by law to the absolute and exclusive control of such children, and that they are in any way illegally restrained or imprisoned, or that because of the custody and control of such children by me, that they are subjected to unfit, improper, and harmful influences.

III. Such children are of tender years, and are at an age when they must especially need the care and control of a mother, (*and state other reasons in detail, why the children should remain under the control of their mother and their grandparents*).

IV. (*State as to financial ability to provide for the support and education of such children.*)

V. (*State reasons why it is not safe or proper for the children to be placed in the custody of the father, and any other matter which can be shown in favor of the retention of the children.*)

Your respondent, therefore, prays that the said writ of habeas corpus may be dismissed.

Dated, ... J. B.

(Verification.)

No. 87.

Traverse.

(Title.)

The relator, for his traverse to the return made by the defendant to the writ of habeas corpus herein,

I. Admits the allegations of paragraphs marked "I," "II" and "IV" of said return.

II. Denies the allegations of paragraphs marked "III," "V" and "VI" of the said return.

WHEREFORE, relator asks for the relief petitioned for herein.

A., B. & C.,
Attorneys for Relator.

Office and P. O. Address, ... Street,, Albany, N. Y.

(Verification.)

No. 88.

Petition for Appointment of General Guardian of an Infant Upwards of Fourteen Years of Age.

SURROGATE'S COURT — COUNTY OF .....

In the Matter of the Application for the Appointment of a General Guardian of A. B., an Infant.

To the Surrogate's Court, County of .....:

The petition of A. B., of the city of ....., county of ....., State of New York, respectfully shows to the court:

I. That the said A. B. is an infant of over the age of fourteen years, having been born on the ..... day of ....., 19..; that he resides with (*state with whom*), at ....., in the city of ....., county of ....., State of New York, and that the full name of said infant is stated above.

II. That the name of the father of petitioner is G. B. and the name of the mother of your petitioner is H. B. and that they are both dead, the former having died on the ..... day of ....., 19.., and the latter on the ..... day of ....., 19... (*If either of them is living, the petition should state the place of residence of the living parent and must set forth the circumstances which render the appointment of another person expedient.*)

III. That your petitioner as a devisee of ....., is seized of and entitled to an estate in fee in (*describe real property*), of the value of ..... dollars, the annual rental value of which is ..... dollars; that he is the owner of and entitled to the following personal property (*describe property*); and on information and belief your petitioner further shows that he has no real or personal property, nor any right or interest therein, other than that above specified; that the estimated value of the personal property of petitioner is ..... dollars, and the annual income from other personal property is ..... dollars, and that the same consists of the following, to wit: (*here describe it*); that the annual income from petitioner's real estate is ..... dollars.

IV. That your petitioner has never had a general guardian nor an acting guardian in socage; nor has any guardian of his person or of his property ever been appointed, at any time, either by a court of competent jurisdiction or by the will of his said father or mother duly admitted to probate as provided by law, nor by the deed duly authenticated, of his said father or mother. That the guardianship of your petitioner's person has never been committed to an incorporated orphan asylum or other institution for the care of orphans, friendless or destitute children, pursuant to section 86 of the Domestic Relation Law. (*If a guardian has been appointed in either of the ways above specified, state reasons of incapacity to act, etc.*)

V. That the only relatives and nearest next of kin of full age of your petitioner residing in the said county of ..... are (*give names and residences*).

VI. That for the proper care and protection of the person and property of your petitioner, it is necessary and expedient that some fit and proper person should be appointed as his general guardian; that A. F., residing at ....., in the city (*or village*) of ....., county of ....., who is your petitioner's uncle, is a fit and proper person to be so appointed as his general guardian. (*State facts showing that the person named would be fit and suitable.*)

Wherefore, your petitioner prays that a decree may be made appointing

the said A. F., as the general guardian of the person (*and property*) of the said petitioner, and that the said ..... (*mother or father, if living, or relatives, and other persons named in Code section* 2647) be cited to show cause why such a decree should not be made, and for such other and further relief as to the court may seem just and proper.

Dated, ... A. B.

(Verification.)

Consent of Guardian.

I, the above-named A. F., hereby consent to be appointed as the general guardian of the person (*and property*) of the petitioner above named, and I hereby offer as my sureties the following persons (*naming them, with their places of residence*).

Dated, ... A. F.

(Acknowledgment.)

(Note.— This form may be adapted for use where the petitioner is a person other than the infant. See Code Section 2646 for additional statements.)

No. 89.

Oath of Guardian.

STATE OF NEW YORK, } *ss.:*
COUNTY OF ALBANY, }

I, ..., do hereby consent to be appointed the guardian of the person and estate of the above named minor, during ..... minority and do solemnly swear and declare that I am a resident of the ..... of ..... in the County of Albany, that I am over the age of twenty-one years, and that I will well, honestly and faithfully discharge the duties of guardian of the person and property of ..... according to law.

.....

Sworn to before me this ..... day of ....., 19.. }

.....

.....

No. 90.

Bond of Guardian.

KNOW ALL MEN BY THESE PRESENTS, That we ....., Guardian, residing in the ..... of ....., N. Y., as principal, and the ....., a corporation duly authorized by the laws

of the State of New York to execute bonds of suretyship and having an office and principal place of business for the State of New York at No. ..... in the City of ....., N. Y., as Surety, are held and firmly bound unto ..... residing in the ..... of ....., N. Y., infant ..... fourteen years of age, in the sum of ..... Dollars, lawful money of the United States of America, to be paid to the said infant ....., Executors, Administrators or Assigns; for which payment well and truly to be made we bind ourselves, our and each of our heirs, Executors, Administrators, Successors, and Assigns, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the ..... day of ..... one thousand nine hundred .....

THE CONDITION OF THIS OBLIGATION IS SUCH, That if the above bounden ..... Guardian, will, in all things, faithfully discharge the trust reposed in h as the ..... Guardian of the above named Infant and obey all lawful directions of the Surrogate of the County of Albany, New York, touching the trust; and will, in all respects, render a just and true account of all money and other property received by h and of the application thereof, and of h guardianship whenever required so to do by a Court of competent jurisdiction, then this obligation to be void, else to remain in full force and virtue.

STATE OF NEW YORK,
ALBANY COUNTY, } *ss.:*

On this ..... day of ..... in the year 19... before me came ..... Guardian, to me known to be the individual described in, and who executed the within Bond and ..... acknowledged the execution thereof.

STATE OF NEW YORK,
ALBANY COUNTY, } *ss.:*

On the ..... day of ..... in the year of 19... before me personally came ..... to me known, who, being by me duly sworn, did depose and say that he resided in the City of ..... that he is the ..... of the ....., the corporation named in and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal, that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in Section 3, of Chapter 720 of the New York Session Laws for the year 1893. And the said ..... further said that he was acquainted with ..... and knew him to be the ..... of said Company, that the signature of the said ..... subscribed to the said instru-

ment is in the genuine handwriting of the said ..... and was subscribed by the like order of said Board of Directors and in the presence of him the said .....

.....

No. 91.

Decree Appointing Guardian.

At a Surrogate's Court, held in and for the county of ..... at the surrogate's office, in the city of ....., on the ..... day of ....., 19..

Present: Hon. O. S., Surrogate.

(Title.)

On reading and filing the petition of A. B., an infant of the age of ..... years, residing at ....., in the city of ....., county of ....., duly verified on the ..... day of ....., 19.., praying for the appointment of A. F., residing at ....., in the city of ....., county of ....., as her guardian of the person (*and property*) of the said A. B., and a citation having duly issued to (*naming persons cited*), the persons entitled by law to be cited to show cause why a decree should not be made as prayed for in said petition, and the same having been duly personally served upon ..... as appears by the affidavit of ..... verified, ... 19... and ..... having duly appeared pursuant thereto (*or otherwise, as the case may be*); and the surrogate having heard the allegations and proofs and duly inquired into the circumstances, and being satisfied that the allegations of the said petition are true in fact, and that the interests of the said infant will be promoted by the appointment of a general guardian of his person (*and property*); and the said surrogate being satisfied that the said A. F. is a fit and proper person to be appointed as such guardian;

NOW, on motion of L. M., attorney for the said infant, it is hereby

ORDERED AND DECREED, That the said A. F. be and he is hereby appointed the general guardian of the person (*and property*) of the said infant, upon taking the official oath prescribed by law, and upon executing to said infant and filing in the Surrogate's office a bond with at least two sureties, in a penalty of ..... dollars, conditioned as prescribed by law, and to be approved by the surrogate, and that letters of guardianship issue to him accordingly.

O. S.,
Surrogate.

No. 92.

Letter of Guardianship.

THE PEOPLE OF THE STATE OF NEW YORK,
To ....., SEND GREETING:

WHEREAS, an application, in due form of law, has been made to our Surrogate's Court of the County of Albany to have said ..... appointed the guardian of ....., a Minor ..... fourteen years of age.

AND WHEREAS, the said ..... has agreed and consented to become such guardian; and we being satisfied that said ..... is a good and reputable person, and is in every respect competent to have the custody of the person and estate of said Minor,

NOW THEREFORE, I, the Surrogate of the County of Albany, by virtue of the power in me vested, constitute and appoint you, the said ..... the general Guardian of the person and estate of said Minor; until ..... arrives at twenty-one years of age, and until another Guardian shall be appointed, for the said Minor, or until your guardianship, by these presents created, shall be legally annulled.

IN TESTIMONY WHEREOF, we have caused the Seal of Office of the Surrogate's Court of the County of Albany, to be hereunto affixed.

[SEAL] WITNESS, ELLIS J. STALEY, Surrogate of said County, at the City of Albany, the ..... day of ..... in the year of our Lord one thousand nine hundred and .....

.....

Surrogate.

(Copy of Sections 2660 and 2661 of the Code should be annexed.)

No. 93.

Annual Inventory and Account of Guardian.

SURROGATE'S COURT — COUNTY OF ALBANY.

In the Matter of The Annual Inventory and Account of .....
General Guardian,
of
..... Infant.

I, ... residing at ..... General Guardian of ..... infant , do make, render and file the following Inventory and account:

On the ..... day of ....., 19.., I was duly appointed the

General Guardian of ..... infant , by the Surrogate of the County of Albany.

SCHEDULE A, hereinafter set forth (as part of said Inventory), contains a full and true statement and description of each article or item of personal property of said ....., received by me since ....., the date of ..... and of the value of each article or item so received.

SCHEDULE B, hereinafter set forth (as part of said Inventory), contains a full and true statement and list of the articles or items of said property now remaining in my hands.

SCHEDULE C, hereinafter set forth (as part of said Inventory), contains a full and true statement of the manner in which I have disposed of the articles or items of said property not remaining in my hands.

SCHEDULE D, hereinafter set forth (as part of said Inventory), contains a full and true statement of the amount and nature of each investment of money made by me, and of the manner in which the fund is at present invested.

Said SCHEDULES A, B, C AND D constitute said inventory and are respectively signed by me.

SCHEDULE E, hereinafter set forth and signed by me, is a full and true account, in form of debtor and creditor, of all my receipts and disbursements of money since ..... the date of ....., and distinctly states the amount of the balance remaining in my hands, to be charged to me in the next year's account, as the sum of ..... Dollars.

SCHEDULE F hereinafter set forth contains the names and residences of the sureties on my bond; that all of them are living and that the security of the bond has not become impaired.

All of which is respectfully submitted.

Dated ....., 19...

.....

SCHEDULE A.

SCHEDULE B.

SCHEDULE C.

SCHEDULE D.

SCHEDULE E.

SCHEDULE F.

STATE OF NEW YORK, } ss.:
ALBANY COUNTY, }

I, the subscriber, ..., the General Guardian of the property of the infant hereinbefore mentioned, being duly sworn, say that the fore-

going inventory and account contains to the best of my knowledge and belief, a full and true statement of all my receipts and disbursements, as such Guardian, on account of said infant; and of all money and other personal property of said infant, which have come to my hands as such Guardian, or have been received by any other person by my order or authority, or for my use, since my appointment, (or since the filing of my last annual inventory and account); and of the value of all such property; together with a full and true statement and account of the manner in which I have disposed of the same; and of all the property remaining in my hands at the time of filing this inventory and account; and a full and true description of the amount and nature of each investment made by me since my appointment (or since the filing of my last annual inventory and account); and that I do not know of any error or omission in said inventory or account, to the prejudice of said infant.

.....

Sworn to before me this ..... day of ....., 19...

.....

No. 94.

Application for Order Allowing and Confirming Adoption.

COUNTY (or Surrogate's) COURT — COUNTY OF .....

In the Matter of the Adoption of A. B., by C. D. and E. D.

To the County Court (*or Surrogate's Court*) of the County of ....., State of New York:

Your petitioner, C. D., by his petition, respectfully shows to the court as follows:

I. That your petitioner, C. D., is a resident of the county of ....., residing with E. D., his wife, at ....., in the city of ....., in said county. That petitioner and his said wife are over 21 years of age.

II. That the above-named A. B. is a minor of the age of ..... years, having been born on the ..... day of ....., 19.....

III. That the said A. B. is the legitimate child of D. B. and L. B., who now reside at ....., in the city of ....., county of ....., State of New York (*or state if but one be surviving; or if A. B. be the illegitimate child of L. B., state whether his mother be surviving and where she resides, but the fact of illegitimacy should not appear upon*

the record. If it appears that the parent has abandoned the child, or is deprived of civil rights, or divorced because of his or her adultery or cruelty, or adjudged to be insane, or to be an habitual drunkard, or judicially deprived of the custody of the child on account of cruelty or neglect, it should be so stated. If no parent be living, and no person can be found who has the lawful custody of the child, it should be so stated. If a person, other than the parents, has lawful custody of the child, it should be so stated, giving name and residence or such person.)

IV. That the said C. D., your petitioner herein, is a married man; that the said C. D. desires to adopt the said child, pursuant to the provisions of the Domestic Relations Law, and to treat such child as his own lawful child, and to extend to such child all the benefits, privileges and rights contemplated by such law; that his wife, E. D., consents to the adoption of the said child, A. B.

V. (*State circumstances showing that the moral and temporal interests of the child will be promoted by the adoption*).

VI. That the said D. B. and L. B., the parents of the above-named child, A. B., (*and the said A. B. if over* 12 *years of age*) consent to such adoption. (*See Domestic Relations Law* § 111, *as to the consents required; which should be specified herein. If the infant is* 18 *years of age or upwards and the consents cannot be obtained it should be so stated and the facts in relation thereto set forth.*) That all of said consents are hereto annexed.

VI. That the consent and agreement of your petitioner, in the form and containing the matters required by law, will be submitted herewith.

Wherefore, your petitioner prays that an order issue from this court allowing and confirming the adoption of the said child, A. B., by your said petitioner, and directing that the said child shall thenceforth be regarded and treated in all respects as the child of your petitioner, the foster parent.

C. D.

(Verification.)

No. 95.

Consent to Adoption.

COUNTY (*or Surrogate's*) COURT — COUNTY OF .....

(Title.)

The undersigned D. B. and L. B., the parents of the above-named child, A. B., do hereby consent to the adoption of such child by the said C. D., and E. D., his wife, residing at ....., in the city of ....., county of ....., and State of New York.

Dated.....

D. B

L. B

STATE OF NEW YORK,
COUNTY OF ....., } *ss.:*
City of .....,

On the ..... day of ....., 19...., personally came before me the above-named D. B. and L. B., to me personally known to be the persons described in and who executed the foregoing consent, and duly acknowledged to me that they executed the same.

.....

.....

(Note.—This form may be adapted for use by all persons required by section 111 of the Domestic Relations Law to give consent to the adoption of a child.)

No. 96.

Statement as to Age of Child.

(Title.)

STATE OF NEW YORK,
COUNTY OF ....., } *ss.:*
City of .....,

L. M., being duly sworn, deposes and says that he is well acquainted with the above-named minor child (*state relationship, if any, or other reasons why deponent is qualified to certify as to age of child*), and that, on information and belief, said child was born on the ..... day of ..... 19...., and is now of the age of ..... years (*or state, "that he has made diligent inquiry to ascertain the age of the said minor child, and as nearly as the same can be ascertained such age is ..... years, and ..... months." And also state source of information*).

L. M.

Sworn to before me, this .....
day of ....., 19....

.....

No. 97.

Agreement for Adoption.

(Title as in Form No. 94.)

THIS AGREEMENT, made on the ..... day of ....., 19...., between C. D. and E. D., his wife, residing at ....., in the city of ....., county of ....., State of New York, parties of the first part, and hereinafter also called the "foster parents," and D. B. and L. B., residing at ....., in the city of ....., county of .....,

State of ....., the parents of A. B., the child hereinafter mentioned, parties of the second part, and X. Y. (*the minor or other person whose consent is necessary*) party of the third part.

WITNESSETH, That, whereas the said parties of the first part are desirous of adopting, pursuant to the provisions of the Domestic Relations Law, A. B., a minor male child, of ..... years of age, and to treat such child as his own lawful child, and to extend to such child all the benefits, privileges and rights contemplated by such law; and

WHEREAS, the parents of such child, the said parties of the second part, and the party of the third part, approve of and consent to the adoption of the said child;

NOW, THEREFORE, in consideration of the premises herein, it is mutually agreed by and between the parties hereto, and the said parties do hereby covenant and consent:

First: That the said parties of the first part will and do hereby adopt and will treat the above-mentioned minor child, A. B., aged ..... years, as their own lawful child, hereby extending and assuring to such minor child all rights, benefits and privileges incident to such relation; and hereby assuming and engaging to fulfill all the responsibilities and duties of parents in respect to such minor child.

Second: And the said parties of the first part and of second part and the party of the third part hereby consent, and each for himself and herself hereby consents, to such adoption, and covenants and agrees to acquiesce therein, and to refrain from doing or causing to be done any act or thing whatsoever inconsistent or in any way interfering with the rights, privileges or duties of such child when adopted.

Third: That the name of said A. B. shall be changed to J. D., by which new name said minor shall be known.

In witness whereof, the said parties hereto have severally set their hands and seals, on this ..... day of ....., 19....

Signed in the presence of

.....,
(County Judge or Surrogate)

C. D. (Foster Parent)
E. D. (Foster Parent)
D. B. (Father)
L. B. (Mother)
A. B. (Minor, if over 12 years of age)
X. Y.

Acknowledgment to be made before the County Judge or Surrogate.

No. 98.

Order Confirming Adoption.

(Title as in Form No. 94.)

The above-named C. D. and E. D., the foster parents, and A. B., the minor, and D. B. and L. B. (*or such other persons whose consents are required by section* 111 *of the Domestic Relations Law*), having appeared before me and been examined as required by the Domestic Relations Law; and upon reading and filing the application of C. D., duly verified on the ..... day of ....., 19..; and an instrument containing substantially the consents required by the said law, an agreement of the said C. D. and E. D., as foster parents, to adopt and treat the said minor child as their own child, and a statement of the age of the child, as nearly as the same can be ascertained, and the new name by which said minor shall be known, having been presented to me; and the said instrument having been signed by the foster parents and by each person whose consent is necessary to the adoption, and which was severally signed and acknowledged by the said persons before me.

And it also appearing, from the examination of the persons appearing before me, and from other information obtained by me in the premises (*including the affidavit of L. M., verified the ..... day of .....*, 19.., *and add statement of any other affidavits*); that the said foster parents are adults; that said minor is of the age of ..... years; (*that notice of the adoption of said minor has been duly given to the parents of said minor*); (*that the consent of ..... cannot be obtained for the reason that ..... and, in my opinion, the moral and temporal interest of said minor will be promoted by a waiver thereof*); that there is no reasonable objection to the change of name proposed; (*that said minor has no father or mother living and no person can be found who has the lawful custody of said minor*); that the moral and temporal interests of the child will be promoted by allowing and confirming the adoption of such minor child (*state reasons as required by section* 113 *of the Domestic Relations Law*), it is hereby

ORDERED AND ADJUDGED, That the said adoption of the said minor child, A. B., by the said foster parents, C. D. and E. D., be and the same is hereby in all respects allowed and confirmed; and it is hereby further

ORDERED AND ADJUDGED AND DIRECTED, That the said minor child shall hereafter be regarded and treated in all respects as the child of the said C. D. and E. D., foster parents, with all the rights and privileges conferred by law; and it is further

ORDERED, ADJUDGED AND DIRECTED, That the name of said minor be and the same hereby is changed from A. B. to J. D., and it is further

ORDERED AND ADJUDGED, That the consent of ..... be and the same hereby is waived and dispensed with.

ENTER:

(Signature of county judge or surrogate.)

No. 99.

Order Confirming Adoption from Charitable Institution.

At a Surrogate's Court, held in and for the County of Albany, at the County Court House, in the City of Albany, Albany County, N. Y., on the 16th day of December, A. D. 1920.

Present: HON. ELLIS J. STALEY, Surrogate.

In the Matter
of the
Adoption of E. F., a Minor, by A. B.
and C. B., his Wife.

On the 16th day of December, 1920, A. B. and C. B., his wife, who reside in the County of Albany, N. Y., foster parents of E. F., a minor, having appeared before me, together with the said E. F., said minor, whose adoption is applied for in this proceeding, and the said A. B. and C. B. having presented to me an instrument containing substantially the consents required by the Domestic Relations Law relating to the adoption of children, and having duly presented to me an agreement on the part of the said foster parents to adopt and treat the said minor as their own lawful child, and containing a statement of the age of the said person to be adopted, and reciting that a change of the name of said minor is desired from E. F. to D. B., and the said A. B. and C. B. having been examined by me, and it appearing that the said child is in the lawful custody of the State Charities Aid Association, a corporation duly incorporated under the laws of the State of New York, and empowered to place children in homes for adoption, and it further appearing that the mother of said child was unable to care for her and surrendered and abandoned her to said State Charities Aid Association for the purposes of adoption on February 20, 1920, and that the mother of said child and said child had previously been deserted and abandoned by the father, and that the said mother surrendered said child to the State Charities Aid Association by an instrument in writing dated the 20th day of February, 1920, for the purpose of adoption, with the understanding that the said Association was to provide the said infant with a home in the United States until it shall reach the age of twenty-one years, and it further appearing that the said child is by religious faith a Protestant, and that the said A. B. and C. B. are Protestants, and that the said State Charities Aid Association has investigated the circumstances of A. B. and C. B., and have found that their reputation, moral character and station in life is good, and that said minor child, if adopted by them, will be given a

comfortable home and fine treatment, and that its welfare will be promoted.

Now, therefore, on reading and filing the consent and agreement of the State Charities Aid Association and A. B. and C. B., dated the 3rd day of December, 1920, and the affidavit of J. D., dated the 3rd day of December, 1920, and the surrender of E. F. dated February 20, 1920, and being satisfied that the moral and temporal interests of the said E. F. will be promoted by the adoption of her by A. B. and C. B., his wife, and being also satisfied that there is no reasonable objection to the change of name of E. F. to D. B., it is

ORDERED, that the said A. B. and C. B., his wife, take the said E. F. into the relation of child, and acquire the rights and incur the responsibilities of parent in respect to said minor, and that the adoption of said E. F. by the said A. B. and C. B. is hereby in all respects ratified and confirmed. And it is further

ORDERED, AND I HEREBY DIRECT, that the said E. F. shall henceforth be regarded and treated in all respects as the child of A. B. and C. B., the foster parents of the said child. And it is further

ORDERED, AND I HEREBY DIRECT, that the name of the said E. F. be and the same is hereby changed to D. B., and she shall be hereafter known by the said name, D. B.

ENTER:

ELLIS J. STALEY,
Surrogate.

No. 100.

Consent and Agreement; Adoption from Charitable Institution.

SURROGATE'S COURT — ALBANY COUNTY.

(Title.)

THIS AGREEMENT made the 3rd day of December, 1920, by and between A. B. and C. B., his wife, residing at Albany, Albany County, New York, both adults, hereinafter called the "foster parents," and State Charities Aid Association, of New York, a corporation duly incorporated under the laws of the State of New York, and empowered to place children in homes for adoption, and having its principal offices in the Borough of Manhattan, City and County of New York.

WITNESSETH:

Whereas the said foster parents desire to adopt, pursuant to the provisions of the "Domestic Relations Law," a minor child known as E. F., born on or about the 30th day of January, 1920; and

Whereas the said foster parents, if permitted to adopt said child, agree to treat such child as their own lawful child and accord to such child all the rights, benefits and privileges of such relationship; and

Whereas the said child is now lawfully in the care and custody of the said State Charities Aid Association; and

Whereas the said State Charities Aid Association has investigated the circumstances and character of the said foster parents with reference to the moral and temporal interests of the child whose adoption is proposed and approves of its adoption by the aforesaid foster parents;

Now, Therefore, the parties hereto mutually agree, covenant and consent:

First: The said foster parents jointly and severally covenant and agree to adopt and treat E. F., the said minor as his, her and their own lawful child and to accord to such minor child all the rights, benefits and privileges of such relationship and to fulfill all the duties and responsibilities of parents with respect to such minor child.

Second: State Charities Aid Association hereby consents to such adoption and surrenders its custody of said child and covenants and agrees to refrain from doing or causing to be done any act or thing whatsoever inconsistent therewith or in any way to interfere with such child when adopted or the foster parents aforesaid; and further consents that the name of the child be changed to D. B.

In Witness Whereof, the parties hereto have severally set their hands and seals the day and year first above written.

STATE CHARITIES AID ASSOCIATION,

[SEAL] By J D., *Secretary*,

A. B.

C. B.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

On this 3rd day of December, 1920, before me came J. D., to me personally known and known to me to be Secretary of State Charities Aid Association, who being by me duly sworn did depose and say that he resides in Yonkers, Westchester County, N. Y.; that he is Secretary of State Charities Aid Association, the corporation described in and which executed the foregoing certificate; that he knows the corporate seal of State Charities Aid Association; that the seal affixed to the foregoing instrument is such corporate seal; and that the seal was affixed to the said instrument by order of the Board of Managers of said corporation and that he signed his name thereto by like order.

.....

[NOTARY'S SEAL] *Notary Public.*

STATE OF NEW YORK,
COUNTY OF ALBANY, } *ss.:*

On this 16th day of December, 1920, before me personally came A. B. and C. B., his wife, both to me proved to be, on the oath of X. Y., Esq., a practicing attorney, the individuals described in and who executed the

foregoing instrument and they thereupon duly and severally executed the same before me and acknowledged to me that they executed the same.

ELLIS J. STALEY.
Surrogate.

No. 101.

Affidavit; Adoption from Charitable Institution.

SURROGATE'S COURT — ALBANY COUNTY.

(Title.)

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

J D., being duly sworn, deposes and says: that he is Secretary of State Charities Aid Association, a corporation duly incorporated under the laws of the State of New York, and empowered to place children in homes for adoption and that he is familiar with the records of said Association; that the following statement is made upon information and belief and that the source of his information and the grounds of his belief are the records of said Association, the examination of official records by officers and agents of the said Association and their reports and investigations and that he believes the following statement to be true:

The above named minor, E. F., was born on or about the 30th day of January, 1920; the religious faith of the child is Protestant.

The circumstances of A. B. and C. B., his wife, who seek to adopt the said minor child with respect to its moral and temporal welfare have been investigated and it has been found that the religious faith of the said persons is Protestant; their reputation good; their character moral and their station and means in life such that the said minor child if adopted by them will be given a comfortable home and kind treatment and its welfare will be promoted.

Since the 22nd day of April, 1920, the said child has been in the care and keeping of the said persons who propose to adopt it and has been properly cared for and well treated.

The said minor child came into the custody of State Charities Aid Association by reason of the following facts:

The mother of said child was unable to care for her and surrendered her to the State Charities Aid Association for purposes of adoption on February 20, 1920; that the mother and child had previously been deserted by the father.

That the surrender of the said E. F. by her mother is hereto annexed.

J. D.

Subscribed and sworn to before me this
3rd day of December, 1920.

.....

[NOTARY'S SEAL] *Notary Public.*

No. 102.

Surrender of Parent; Adoption from Charitable Institution.

State Charities Aid Association — No.
Child Placing Agency — New York
105 East 22nd Street, New York City — Office.

SURRENDER

New York, Feb. 20, 1920.

Name of Child, E. F.
Birthday, Jan. 30, 1920. Birthplace, Ross Health Resort, Brentwood.

THIS CERTIFIES that G. F., residing at ....., am the mother of the child E. F., and I am 41 years of age, and the child is indigent, destitute and homeless. Feeling that the welfare of the said child will be promoted by placing it in a good home I do hereby voluntarily and unconditionally surrender it to the care and custody of the STATE CHARITIES AID ASSOCIATION, of New York, with the understanding that the agent of the said Association is to provide it with a home in the United States until it shall reach the age of 21 years, unless prevented from doing so by some physical or moral disease, by the gross misconduct of the child or by its leaving the place provided for it without the knowledge or consent of the State Charities Aid Association, and I pledge not to interfere with the custody or management of the said child in any way, or encourage or allow any one else to do so, and I hereby expressly authorize and empower the State Charities Aid Association to consent to the adoption of said child, in the same manner and without notice to me as if I personally gave such consent at time of such adoption.

Signature G. F.

Witness: L. M.

STATE OF NEW YORK, } *ss.:*
COUNTY OF NEW YORK, }

On this 20th day of February, A. D. 1920, before me personally appeared G. F., to me known and known to me to be the individual described in and who executed the above surrender of the child, and who, being duly sworn, did depose and say, that she did execute the same as her act and deed by her own free will for the purposes therein contained.

N. O.,
Notary Public.

[SEAL]

VIII. DOWER.

No. 103.

Complaint in Action for Dower.

SUPREME COURT — COUNTY OF .....

A. D.

against

L. D., E. D., and C. D., as Administrator of the Estate of D. D., Deceased (*or, as Executor, etc.*).

The complaint of the above-named plaintiff **respectfully shows:**

I. That the plaintiff, A. D., was married to D. D., deceased, late of the city of ....., county of ....., State of New York, on the ..... day of ....., 18...., and lived and cohabited with him as his wife until he died on the ..... day of ....., 19....

II. That the said D. D. died intestate leaving him surviving the plaintiff, his widow, and two children, L. D., a son and E. D., a son; (*or that the said D. D. died leaving a last will and testament which was duly admitted to probate on the ..... day of ....., 19.., by the Surrogate of the County of Albany, State of New York, in which county the said D. D. resided at the time of his death, and that C. D. was named executor in said will, and on the ..... day of ....., 19.., letters testamentary duly issued to the said C. D. appointing him as executor under said will, and he, thereupon, duly qualified as executor thereof, and became and ever since has been and now is acting as such*); that, thereafter, and on or about the ..... day of ....., 19...., letters of administration were duly issued and granted to the plaintiff by the Surrogate of the County of Albany, in which county said D. D. resided at the time of his death, and that said C. D. was duly appointed as administrator of the goods, chattels and credits of said deceased, and said C. D., thereupon, duly qualified as such administrator and entered upon the performance of his duties, and then became and ever since has been and now is acting as such administrator.

III. That the said D. D., was seized and possessed at the time of his death of the following described real estate (*describe property with common certainty by setting forth the name of the township or tract, and the number of the lot, if there is any, or in some other appropriate manner; so that from the description, possession of the property claimed may be delivered.*)

IV. That the defendants L. D. and E. D., upon the death of the said D. D., were and are in actual possession and occupation of the real estate above described and claim to be the owners thereof as the heirs-at-law of the

said D. D. (*If the premises are not actually occupied by the defendants named, but such defendants are exercising certain acts of ownership thereon, or claiming title thereto, or interest therein, at the time of the commencement of the action, it should be so stated, with a description of the acts of ownership so exercised. If there are other persons claiming title to or right to the possession of the property, they should be made defendants and the facts in relation thereto set forth.*)

V. (*If damages are claimed for withholding dower, an allegation should be inserted to the following effect: That the mesne profits of the above-described premises, since the death of the said D. D., is the sum of ..... dollars; that no part of the one-third portion thereof, of which this plaintiff is entitled, has been paid to her by the said defendants L. D. and E. D.*)

(*If the action is against any other person than an heir-at-law, the amount of the profits should be alleged from the date when the plaintiff demanded her dower of the defendant in possession of the premises, and such demand should be alleged.*)

Wherefore, the plaintiff demands judgment, that as widow of the said D. D., deceased, she is entitled to her dower in all the real estate above described; that her said dower in said described premises may be set off and admeasured to her by a referee to be appointed for that purpose, or in such other manner as this court may direct; and that she may recover from the above-named defendants, as damages for withholding her said dower, the sum of ..... dollars, together with the costs of this action, and for such other and further relief as to the court may seem just and proper.

L. M.,
Attorney for the Plaintiff.

(Verification.)

No. 104.

Interlocutory Judgment in Action for Dower.

(Title of Action and Caption.)

The above-entitled action having been duly brought to trial at a Trial Term of this court, held in and for the County of ....., at ....., in the City of ....., commencing on the ..... day of ....., 19.., and this action having been reached for trial on the ..... day of ....., 19.., and the action having been by stipulation, duly made in open court, waiving a jury trial, tried before the court without a jury, and said court having filed its decision (*or, where the action was referred to a referee for trial, or tried before a jury, the recitals should be made in accordance therewith*).

Now, therefore, in accordance with said decision, it is

ADJUDGED (1) That the plaintiff is entitled to dower in the premises hereinafter described.

(2) That D. F. be and he is hereby appointed by this court as a referee to admeasure dower and to ascertain with what and how it should be charged, and to determine its value in accordance with the statute in such case made and provided, and report to the court, with all convenient speed, that the court may take final action therein.

(3) That either party have liberty to apply to this court for such further order or judgment of the court as either may be advised.

(4) The property above mentioned is bounded and described as follows: (*Insert herein description of premises as contained in complaint.*)

ENTER:

HAROLD J. HINMAN,
J. S. C.

No. 105.

Oath of Referee.

(Title of Action.)

STATE OF NEW YORK,
COUNTY OF ....., } *ss.:*
City of ....., }

D. F., the referee appointed in the above-entitled action to admeasure dower, by an interlocutory judgment, dated the ..... day of ....., 19.., and entered in the office of the County Clerk of ..... county, on the ..... day of ....., 19.., being duly sworn, deposes and says:

That he will faithfully, honestly and impartially discharge the trust reposed in him and determine the questions referred to him, and make a just and true report, according to the best of his understanding.

Subscribed and sworn to before me, this
..... day of ....., 19.. }

.....

No. 106.

Report of Referee for the Admeasurement of Dower.

(Title of Action.)

To the Supreme Court:

I, the undersigned, D. F., the referee appointed by an interlocutory judgment herein, dated the ..... day of ....., 19.., and entered in the office of the County Clerk of the County of ....., on the ..... day of ....., 19.., to admeasure the plaintiff's dower in the premises therein described, and to ascertain the value of such dower

and to report to this court the respective amounts so ascertained, with all due and convenient speed, do hereby report:

I. That before proceeding with the hearing of the matter so referred to me, I took and filed the oath prescribed by law.

II. On the ..... day of ....., 19.., I attended at the premises described in such judgment, and the plaintiff, A. D., by her attorney, L. M., and the defendants, L. D., E. D., and C. D., by their attorney, C. P., appeared before me at the time and place aforesaid and pointed out to me the boundaries of the said property and the permanent improvements made thereupon after the death of the said plaintiff's husband.

III. And I further report that in my opinion it is not for the best interests of all the parties concerned to admeasure and lay off to the said A. D., the plaintiff herein, a distinct part of said property, for the following reasons: (*Here state with certainty why it is not practicable for the best interests of the parties to lay off a distinct parcel as the dower of the plaintiff.*)

IV. And I further report that under a stipulation of the respective parties herein, I attended at ....., in the City of ....., State of New York, on the ..... day of ..... 19.., and took testimony of certain witnesses to ascertain the rental value of said property, which said stipulation and testimony, signed by the said witnesses, is hereto annexed.

V. And I further report that after hearing the testimony of the witnesses as aforesaid, to ascertain the rental value of the said property, and after hearing L. M., of counsel for the said plaintiff, and C. P., of counsel for the said defendants, and after due consideration of all the evidence before me in this matter, I find that the annual rental value of said property, independent of the improvements made thereupon by the said defendants, since the death of D. D., the deceased husband of the said plaintiff, was the sum of ..... dollars for the year ....., and that the annual rental value of said property since such time has been and still is the sum of ..... dollars.

VI. The items of my charges herein are:

1. For one day attending at said property to see if admeasurement could be made..... $.....
2. For three days' services in taking testimony to ascertain the annual rental value of said property..... .....
3. For one day's services in preparing this report..... .....
4. For traveling expenses..... .....

$.....

In witness whereof, I have hereunto set my hand this ..... day of ....., 19..

D. F.,
Referee.

(Acknowledgement.)

No. 107.

Release of Dower.

(Title of Action.)

The undersigned, A. D., the plaintiff in the above-entitled action, hereby consents to accept a gross sum in full satisfaction of her right of dower in the real property, described in the complaint herein, the amount thereof to be ascertained pursuant to law.

A. D.

Dated ....., 19..

(Acknowledgment.)

No. 108.

Final Judgment Admeasuring Dower.

At a Special Term of the Supreme Court, etc.

(Title of Action.)

The above-entitled action having heretofore been duly brought to trial at a Trial Term of this court, held in and for the County of ....., at ....., in the City of ....., commencing on the ..... day of ....., 19.., and trial by jury having been waived in open court, and trial having been had and the decision of the court made and filed, and an interlocutory judgment having been rendered and entered in the office of the County Clerk of ..... County, on the ..... day of ....., 19.., by which judgment D. F. was appointed referee to admeasure the plaintiff's dower in the premises described in such judgment, and who pursuant to stipulation took testimony to ascertain the rental value of said premises, and the report of said referee having been duly filed in the office of the County Clerk of ..... County, on the ..... day of ....., 19.., and said report having been confirmed by an order of this court, dated the ..... day of ....., 19.., and entered in the office of the County Clerk of ..... County, on the ..... day of ....., 19..,

Now, after hearing L. M., of counsel for the plaintiff, and C. P., of counsel for the defendants, in opposition thereto, and on motion of L. M., attorney for the plaintiff, it is

ADJUDGED (1) That the report of the said D. F., as referee, be and the same is hereby in all respects confirmed.

(2) That the plaintiff herein is entitled to dower in the premises described in the complaint as follows: (*Insert description.*)

(3) That upon the evidence taken by the said referee, D. F., in relation

to the rental value of said premises, the rental value thereof for the year ....., was the sum of ..... dollars, and that the annual rental value of such premises since such time has been and still is the sum of ..... dollars, independent of taxes or other charges.

(4) That the defendants L. D. and E. D., pay to the plaintiff the sum of ..... dollars per year, on the first day of January of each year during her life, as and for her dower in the said premises, and that said sum so to be paid be and remain a charge upon the said property during the natural life of plaintiff.

(5) That one-third of the annual value of the mesne profits of such premises is ..... dollars.

(6) That the plaintiff, A. D., recover of the defendants, L. D. and E. D., the sum of ..... dollars, as damages for withholding said plaintiff's dower from the ..... day of ....., 19.., to the date hereof, with the additional sum of ..... dollars as and for her costs in this action, and her disbursements herein, to be hereafter taxed by the clerk.

A. B. P.,
J. S. C.

(NOTE.— The foregoing form is substantially the same as that used in the case of *Everson* v. *McMullen*, 113 N. Y. 293.)

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